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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ANANT KUMAR TRIPATI,
Petitioner,

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, GUNN McKAY; DEAN CHATFIELD; DONALD CONRAD; MARICOPA COUNTY ATTORNEY; COUNTY OF MARICOPA; TERRY BLAKE; RONALD HARRIS; DICK MESH; GERALD GRANT; RICHARD M. ROMLEY; TERESA ARCHULETA; VINCENT H. TOLINO; ESTATE OF TERESA ARCHULETA; ED KING; BETSEY BAYLESS; TOM RAWLES; DON STAPLEY; MARY ROSE WILCOX; DORA SCHRIRO, ADOC DIRECTOR; TERRY GODDARD ATTORNEY GENERAL ARIZONA; MICHAEL MUKASEY, ATTONEY GENERAL UNITED STATES
Respondents,

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME ONE OF THREE

ANANT KUMAR TRIPATI
P.O. BOX 70662,
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PETITIONER PRO PER

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APPEALS CLERK

IN THE UNITED STATES COURT OF APPEALS
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-17148

Anant Kumar Tripati, Plaintiff, v. Gunn McKay, et al., Defendants,	**ORDER**

CASE NO: No. 04-17148
D.C. Nos.
CV-94-00170-ROS
CV-94-00504-ROS
CV-95-00702-ROS

District of Arizona, Phoenix:
Before: O'CONNOR, RYMER, and THOMAS, Circuit Judges.

On December 20, 2006, the Court issued an order

denying abatement of time for appellant to file a petition for rehearing en bane. On January 11, 2007, the mandate issued. The Court received appellant's motion to reconsider the order of December 20, 2006. That motion is denied. The Court also received appellant's motion to recall the mandate. That motion is also denied.

The Court will entertain no further motions on this closed case.

The Honorable Sandra Day O'Connor, Retired Associate Justice for the Supreme Court, sitting by designation.

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APRIL 22, 2007
US COURT APPEALS

UNITED STATES COURT OF APPEALS
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04-17148

Anant Kumar Tripati, Plaintiff, v. Gunn McKay, et al., Defendants,	**ORDER**

D.C. Nos.
CV-94-00170-ROS
CV-94-00504-ROS
CV-95-00702-ROS,

Before: O'CONNOR,* RYMER, and THOMAS, Circuit Judges.

The appellant's motion to abate time in order to file a petition for rehearing and/or petition for rehearing en banc is DENIED.

The Honorable Sandra Day O'Connor, Associate Justice for the Supreme Court of the United States (Ret.), sitting by designation.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-17148

Anant Kumar Tripati,	)
	)
Plaintiff,	)
v.	)
	)
GUNN MCKAY; DEAN CHATFIELD; DONALD CONRAD, Maricopa County Attorney; COUNTY OF MARICOPA; TERRY BLAKE; RONALD HARRIS; RICHARD MESH; GERALD GRANT; RICHARD M. ROMLEY; TERESA ARCHULETA; VINCENT H. TOLINO; ESTATE OF TERESA ARCHULETA, ED KING; BETSEY BAYLESS; TOM RAWLES; DON STAPLEY; MARY ROSE WILCOX,	)

D.C. Nos.
CV-94-00170-ROS
CV-94-00504-ROS
CV-95-00702-ROB,

Appeal from the United States District Court
for the District of Arizona,

Roslyn O. Silver, District Judge, Presiding

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.[1]

Submitted October 20, 2006** San Francisco, California

Before: O'CONNOR, Associate Justice, Retiree", RYMER, and THOMAS, Circuit Judges.[2]

Anant Kumar Tripati appeals the district court's decision dismissing his pro se civil rights action against Maricopa County and various Maricopa County officials. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I.

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[1] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[2] The Honorable Sandra Day O'Connor, Associate Justice for the Supreme Court of the United States (Ret.), sitting by designation.

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I.

The district court correctly held that Tripati's federal claims—only one of which he asserts on appeal—were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). Tripati argues that the district court erred by holding that Tripati's illegal search and seizure claim was barred by *Heck*. If "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," the complaint must be dismissed. *Heck*, 512 U.S. at 487. Because evidence obtained in the allegedly illegal search and seizure was used for his conviction, the district court did not err in barring his Fourth Amendment claim under *Heck*. *See Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (interpreting *Heck* as precluding any such claim).

II.

As to the non-federal claims, we conclude that the district court did not make impermissible credibility and evidentiary determinations in granting judgment as a matter of law in favor of the defendants. In rendering judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, a district judge "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). However, to defeat a judgment as a matter of law, "the nonmoving party must come forward with more than a scintilla of evidence." *See Miller v. Glen Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Here, the defendants have offered an overwhelming amount of evidence to refute

Tripati's allegations and to substantiate that the search and seizure was the culmination of an extensive investigation into Tripati's fraudulent practices–an investigation that ultimately led to a criminal conviction. Tripati's conclusory statements and self-serving declarations are too speculative to survive a motion for judgment as a matter of law. *See United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989). Thus, the district court did not err in granting judgment as a matter of law for each of his claims.

We conclude that any error that the district court committed by granting judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 during the pretrial phase of the proceedings, *see McSherry v. City of Long Beach*, 423 F.3d 1015, 1019 (9th Cir. 2005), was harmless because Tripati was afforded ample opportunity to respond to the deficiencies undergirding the court's judgment as a matter of law, *see id.*, at 1021 (the purpose of Rule 50 is to afford the non-moving party an "opportunity to present evidence, and the court must evaluate the evidence in order to grant a motion under Rule 50"); *see also Waters v. Young*, 100 F.3d 1437 (9th Cir. 1996) (a "major purpose" of a motion under Rule 50 is to give the non-moving party notice, and opportunity to cure, deficiencies of proof).

Given this holding, we need not reach any of the other claims of error asserted by Tripati as to the non-federal claims.

III.

Tripati also contends on appeal that the district court erred in denying his request for a *Franks*

hearing, and in precluding the admission of Teresa Archuleta's statements. There is no basis in the record to show that Tripati ever requested a *Franks* hearing, or that the district court refused to admit statements of Teresa Archuleta.

IV.

Finally, Tripati argues that Judges Silver and Strand abused their discretion in denying Tripati's motion to recuse presiding Judge Silver, pursuant to *28 U.S.C. § § 455, 144.* In order to prevail on a motion for recusal, a petitioner must show either extrajudicial bias or a deep-seated unequivocal antagonism toward the petitioner. *Liteky v. United States*, 510 U.S. 540, 554-55 (1994). Because Tripati demonstrated neither, the district court judges did not abuse their discretion in denying these motions.

AFFIRMED.

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SEP 16 2004
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al., Defendants,	)	

Pending before the Court is Plaintiff Anant Kumar Tripati's Motion for Change of Judge for Cause pursuant to 28 U.S.C. § 144 [Doc. # 575], which was referred to this Court for decision. Having considered Plaintiffs motion, along with the attached affidavit and transcript, Defendants' Response, Plaintiff's Response (Reply), Plaintiffs Supplemental Brief, Defendants' Response and Plaintiffs Reply thereto, as well as pertinent portions of the record and the applicable law, the Court now rules.

A. Background

On December 23, 2003, Plaintiff filed a Motion for Change of Judge for Cause pursuant to 28 U.S.C. §§

144 and 455, alleging that Judge Roslyn 0. Silver "acted as counsel for the defendants" in the above-entitled matter and requesting that she be disqualified and that the case be reassigned to another judge. In an Order filed on June 22, 2004, Judge Silver found that Plaintiff had not established any basis for recusal under § 455' and therefore denied the Motion for Change of Judge pursuant to *28 U.S.C. § 455.*

Judge Silver also considered Plaintiffs Motion for Change of Judge under *28 U.S.C. § 144.* [3]Pursuant to

---

[3] 28 U.S.C. § 455 provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of record stating that it is made in good faith.

the requirements of that subsection, Judge Silver assessed the sufficiency of Plaintiffs affidavit and found it to be inadequate. Although Judge Silver was not required to proceed any further under *§ 144,* she nevertheless ordered that Plaintiffs motion under *§ 144* be heard by another district judge, giving Plaintiff yet another opportunity for review. Accordingly, this Court will now review the merits of Plaintiffs motion.

B. Discussion

In his Motion for Change of Judge, Plaintiff contends that Judge Silver demonstrated bias and prejudice against him based on events occurring at the September 17, 2003 Final Pretrial Conference, at the close of which Judge Silver granted judgment as a matter of law for Defendants. In his affidavit supporting his motion, Plaintiff alleges that Judge Silver (1) "acted as the lawyer for the defendants," "asked the questions," and then failed to allow him to answer fully; (2) expressed "hostility" and "bias" by her "refusal . . . to review [Plaintiffs] motions in limine"; (3) was "so hostile" that she failed to rule consistently with her prior decisions in the present case; and (4) was "biased and hostile" based on Plaintiffs "personal experience" and his review of her decisions in other cases.

The standard for disqualification under 28 *U.S.C. § 144* is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) (quoting United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)). "The alleged prejudice must result from an extrajudicial source; a judge's prior adverse

ruling is not sufficient cause for recusal." United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986).

First, Plaintiffs allegations are not extrajudicial because they relate to Judge Silver's performance while presiding over the case and to her adverse ruling. See id. Next, Plaintiffs claims that Judge Silver was "hostile," even if true, do "[pi]ot establish[] bias or partiality . ." See Liteky v. United States, 510 U.S. 540, 555-56 (1994). This Court has reviewed the transcript of the hearing in question and finds no support for Plaintiffs allegations of bias and prejudice. "A judge's ordinary efforts at courtroom administration . . . remain immune" from challenge. Id. at 556.

Next, with respect to Plaintiffs allegation that Judge Silver refused to review his motions in limine, Plaintiff provides no support for said allegation. Indeed, contrary to this assertion, in her October 16, 2003 Order granting Defendants' Motion for Judgment as a Matter of Law, Judge Silver specifically states that she had reviewed all pending motions, "including motions in limine and objections . . . ." [Doc. # 562]

Furthermore, Judge Silver's ruling was not based solely on Plaintiffs answers to questions posed at the Final Pretrial Conference, but also on her review of "all the pleadings in connection with the trial, including the Joint Pretrial Order and attachments, and of all pending motions (including motions in limine and objections), responses, statements of fact and exhibits thereto."

C. Conclusion

Based on the foregoing, this Court concludes that Plaintiffs allegations would not lead a reasonable person to conclude that Judge Silver's impartiality

might reasonably be questioned. Accordingly,
IT IS ORDERED denying Plaintiffs Motion for Change of Judge for Cause pursuant to *28 U.S.C. § 144* [Doc. # 575].

DATED this 14th day of September, 2004.

S/D_____
ROGER STRAND
US District Court Judge

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OCT 16, 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT
FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,	)	
v.	)	
	)	ORDER
Gunn McKay, et al., Defendants,	)	

On June 13, 2003, Defendants lodged a Motion for Summary Judgment which in major part raised the same allegations made in Defendants' motions in limine. However, because the Motion for Summary Judgment was lodged beyond the date for filing, the Court denied it by minute Order of June 16, 2003. That decision, however, did not preclude the Court from hearing the same issues if properly raised on motion in limine.

After review of all the pleadings in connection with the trial, including the Joint Pretrial Order and attachments, and of all pending motions (including motions inlimine and objections), responses, statements of fact and exhibits thereto, the Court held the Final Pretrial Conference on September 17, 2003. After hearing from the parties at the conference, the Court

granted Defendants' Motion for Judgment as a matter of law pursuant to Rule 50(a), Fed.R.Civ.P. The Court has also considered Plaintiffs Motion for New Trial, which, at Plaintiffs request, the Court has treated as a Response to Defendants' Motion for Judgment as a matter of law (Doc. No. 557 at 3). The federal claims remaining at the conference were Counts 1, 5, 14, 16, 17, 19, 29, 31, 37 and 43. Remaining state law claims were Counts 2, 3, 6, 9, 10, 21 and 24. The Court's rulings at the conference regarding all claims are memorialized in this Order.

At the conference, Plaintiff was given the opportunity to set forth both legal and evidentiary bases to establish that he has a viable cause of action on each count. The Court found that Plaintiffs federal claims are barred by Heck v. Humphrey, 512 U.S. 477,114 S.Ct. 2364 (1994). Additionally, the Court found that the federal claims do not involve violations of the United States Constitution or material violations of federal statutes. The Court further found, after reviewing the motions in limine and responses and hearing from Plaintiff; that taking all reasonable inferences in Plaintiffs behalf his evidence is insufficient as a matter of law for a jury to find in his favor on any of his federal or state law claims.

I. Federal Claims Barred by Reck v. Humphrey

A. Section 1983 Claims

The Supreme Court in Heck v. Humphrey directed lower courts to consider whether or not a judgment in favor of a plaintiff in a § 1983 action "would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487,114 S.Ct: at 2372. If it would, the § 1983 action must be dismissed unless the plaintiff can prove

that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. a., 512 U.S. at 486-87, 114 S.Ct. at 2372. On the other hand, if a judgment in favor of the plaintiff would not necessarily imply the invalidity of the plaintiff's conviction or sentence, then the action should be allowed to proceed unless there exists some other bar to the suit. 512 U.S. at 487,114 S.Ct. at 2372-73. Where a Plaintiff has been convicted, and where a constitutional issue which is inextricably interrelated to the Plaintiffs issue would resolve the matter had it been appealed and reversed by the appellate court, then no basis exists for a civil cause of action under Heck. This determination is made without reference to whether the constitutional issue was actually raised by the defendant in his criminal trial, as the existing outcome of Plaintiffs state appeals process is not an element of the test for determining whether a claim is cognizable under Beck. Rather, the Court looks to what the state court would have held if it had been presented with the constitutional issue. If a judgment in favor of Plaintiff would "necessarily imply the invalidity of his conviction," then he may not bring his claim under § 1983; conversely, § 1983 claims should be allowed to proceed if success on them would not necessarily imply the invalidity of an outstanding criminal judgment against Plaintiff. a, 512 U.S. at 487, 114 S.Ct. at 2372-73.

Plaintiff's constitutional focus is that he was the

target of a racially based selective prosecution, and this issue would have been outcome-determinative in his criminal prosecution. Although Plaintiff argued at the conference that the claims in this action have no bearing on his conviction, it is evident that his civil rights claims cannot be separated from his criminal prosecution, both of which allegedly arose from Defendants' racial animus. Plaintiffs artful attempts to portray the claims in this case as unconnected to his criminal convictions' do not negate his position throughout this litigation that the search and seizure at his office were the result of the Maricopa County Attorney's Office's desire to "target" him at least in part because he is a minority. Indeed, Plaintiff proposed to testify at trial that:

> Richard Mesh and Gerald Grant according to these documents play critical roles.. . They screen all complaints, in their capacity as supervisory staff. They then manufacture whatever needs to be manufacture, to make certain that the wrong that the employee of Maricopa County and Maricopa County Attorney's Office committed is covered up. As a part of the coverup they, according to the documents, offer a citizen, especially a racial minority, the chance to either plead guilty or to settle the forfeiture action. these documents also showed that when racial minorities declined to settle, they used the complete resources of Maricopa County and Maricopa County Attorney's Office to fight the case to the hilt. Racial minorities like me, as evidenced by the documents, do to lack of money, giveup and put up with the misconduct spending years in prison. I am spending 52.5 years just because of this practice. (Dec. 16, 2002 Affidavit of A.K. Tripati, Doc. No. 472 Ex. 11119) (spelling and punctuation as in

original, emphasis added). According to this affidavit, it was precisely Defendants' alleged policy of selectively prosecuting minorities that led both to Plaintiffs conviction and to the civil rights violations alleged in this action.

Plaintiff further argues that his claims, all of which involve the alleged illegal search and seizure, are not barred because the state court of appeals found that there was "overwhelming" evidence of Plaintiffs guilt. Because the evidence against him was "overwhelming,"

Plaintiff argues, any evidence obtained from the search and used against him at trial would not have altered his conviction. However, Plaintiff did not raise at his criminal trial a selective prosecution defense or any other defense based on his race. Therefore, the state court of appeals could not have considered the issue of Defendants' alleged racial bias. The state court determination that the evidence against Plaintiff was "overwhelming" does not control whether Plaintiffs civil claims are barred by Heck because the issue Plaintiff raises here is a substantial one, LQ, whether Defendants prosecuted him based on impermissible racial grounds.

The right to be free from racial discrimination in .a criminal prosecution is a fundamental constitutional right. The Supreme Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race. Wayte v. United States, 470 U.S., at 608, 105 S.Ct., at 1531; United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Nor can a prosecutor exercise permptory challenges on the basis of race. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Swain v. Alabama,

380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). MoCleskey v. Kemp, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 1776 n.30 (1987). Selective prosecution claims are analyzed "according to ordinary equal protection standards." Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531 (1985). Accordingly, to establish selective prosecution, a defendant must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive. United States v. Ness, 652 F.2d 890, 892 (9th Cir.), cert. denied, 454 U.S. 1126, 102 S.Ct. 976 (1981). In this case, Plaintiff claims minorities were "targeted" for prosecution and asset forfeiture, while "[wjhite's (sic) in greater part, with a great deal of money, were not targeted and were let go"
At the conference, Plaintiff said his position is that his race played no part in Defendants' decision to improperly seize his property, but that they seized the property to initiate a forfeiture and to retaliate against Plaintiff for his challenges to their illegal discriminatory actions against others.

(Doc. No. 472 Ex. 1 at 4-5 1 16). Plaintiff provides allegations which meet the first prong of a selective prosecution claim. Plaintiff also provides allegations to fulfill the second prong in his claims that he was targeted because of his race. Thus, Plaintiff established a colorable claim for selective prosecution. If it were determined that Defendants exercised their prosecutorial discretion on the basis of race, then the remedy would be reversal of Plaintiffs conviction. Batson, 476 U.S. at 100, 106 S.Ct. at 1725 (a defendant who can demonstrate that the prosecution exercised its peremptory challenges in a racially discriminatory

manner is entitled to a reversal of his conviction). It is not necessary for the prosecutorial discretion to have been based exclusively on racial considerations to be unconstitutional. A civil rights plaintiff is not required to prove that the challenged action rested solely on racially discriminatory purposes. . . . [RJacial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified. Arlington Heights v. Metro. Hons. Dev. Corp., 429 U.S. 252, 265-66, 97 S.Ct. 555, 563 (1977) (footnotes omitted).

Accordingly, Plaintiffs § *1983 claims* (Counts 1, 5, 14, 16, 17, 19, 29, 31, and 43) must be dismissed without prejudice until such time as Plaintiffs conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus.

B. Fifth Amendment Claim Would Have Been Barred by fled;

Plaintiffs Fifth Amendment claim (Fifth Amended Complaint., Doc. No. 376, Count Twelve) was dismissed by the screening Order for failure to allege that Plaintiffs property was seized for public use[4] (Doc. No. 380 at 5). However, the Court briefly notes that this claim also would have been barred under Heck. This Court has previously considered whether

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[4] The final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use without just compensation"; this applies to the states as well as to the federal government. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S.Ct. 446, 450 (1980).

constitutional claims other than those under the Fourth Amendment might fall within the exception to the Neck doctrine. Observing that the Supreme Court in footnote 7 had cited to Arizona v. Fulminante, 499 US. 279, 307-08,111 S.Ct. 1246 (1991), which held that the harmless error doctrine can apply to the admission of a coerced confession under the Fifth Amendment, this Court concluded that "[t]he analysis of whether the Heck bar applies depends not on the constitutional claim alleged, but on whether the claim, if successful, would invalidate the underlying criminal conviction." Schwartz v. City of Phoenix, 83 F.Supp.2d 1102, 1105 n.2 (D.Ariz. 2000). Here, a claim under the Fifth Amendment for taking without just compensation would have been based on the same facts as Plaintiffs other § 1983 claims and, like those claims, would have necessarily implied the invalidity of Plaintiffs conviction and thus been barred by Heck.

C. Conspiracy Claim Under 42 U.S.C. § 1985(3) Barred by Heck

Although the Supreme Court in Heck addressed only. whether a § 1983 claim for damages could be brought, the same principle applies to the viability of a § *1985(3)* claim for damages. ate Duarnutef v. Morris, 956 F.Supp. 1112, 1117 (S.D.N.Y. 1997) (plaintiffs § 1985(3) claim would necessarily call into question the validity ofhis criminal prosecution); Horton v. Marovich, 925 F.Supp. 532, 537 (14.D.111. 1996). To allow Plaintiff to proceed on his damages claim for a conspiracy even though Heck bars his claim for damages due to violation of the constitutional rights forming the basis of the conspiracy, would be inconsistent with Heck's rationale. Heck cannot be read to allow a plaintiff to pursue a civil rights damages

claim for a violation of conititutional rights when without the allegation of conspiracy damages would not be available for the alleged violation.

Accordingly, Count 37 for conspiracy to deny civil rights under *42 U.S.C. § 1985(3)* must also be dismissed without prejudice until such time as Plaintiffs conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpu

IL Plaintiff Has No Sufficient Evidentiary Basis for Any Claim

After reviewing Plaintiffs proposed trial exhibits, which are included in Defendants' Motion in Limine Re: Plaintiffs Proposed Trial Exhibits (Doc. No. 472, 3-inch black binder) and hearing from Plaintiff at the conference regarding the admissible evidence the Court found that Plaintiff has an insufficient evidentiary basis for a reasonable jury to find in his favor on any of his claims, as set forth below.

A. Federal Claims

Plaintiff has not established that there is sufficient admissible evidence for a jury to determine, taking into account all reasonable inferences in Plaintiffs favor, that the acts and omissions alleged in Counts 1, 5, 14, 16, 17, 19, 29, 31, 37 and 43 constitute violations of his federal civil rights. All of these claims involve the execution of a search warrant on Plaintiffs place of business in California, and the Court found: (1) there was probable cause for Plaintiffs arrest (Arrest Warrant, Doc. No. 472 Ex. 14); (2) the search warrant, which was based on the arrest warrant, was valid and accurate on its face; (3) all property seized can be said to have been seized as potentially related to the crimes

for which Plaintiff was arrested and of which he was convicted, regardless of whether any of that property was actually used as evidence in his criminal trial; (4) Plaintiff has no legally sufficient evidence that the allegedly seized property was not within the scope of the warrant; and (5) Plaintiff consented to the Defendants' alleged taking of his property.

As to Count 14 for violation of the federal extradition statute, *18 U.S.C. § 3182*, and the *Uniform Criminal Extradition Act, Cal. Penal Code §§ 1547-56.2,* any such violation would have been held harmless error had it been raised in the criminal trial since there was probable cause to arrest and extradite Plaintiff. Plaintiff has no legally sufficient and admissible evidence that his extradition from California to Arizona violated his constitutional rights. As to his claims for supervisory liability for alleged violations, Plaintiffhas no legally sufficient and admissible evidence that any official policy, practice, custom or procedure directly caused the violation of his constitutional rights. As stated above, Plaintiff cannot establish by sufficient, admissible evidence that any constitutional violation occurred in the first place. Further, Plaintiff has no sufficient, admissible evidence establishing a causal link between any official policy, practice, custom or procedure and any alleged violation of his constitutional or statutory rights.

The Court determined also that Plaintiff would be unable to prove by sufficient, admissible evidence the personal participation of many of the Defendants in many of the alleged violations of his civil rights.

B. <u>State Law Claims</u>

1. <u>No Jurisdiction Over State Law Claims</u>

Plaintiffs state law claims are before the Court

based on diversity jurisdiction. *Title 28 U.S.C. § 1332* governs diversity jurisdiction and requires a minimum amount in controversy of $75,000. Plaintiff alleges he is a citizen of Fiji and Defendants are citizens of Arizona. Lawful, permanent resident aliens are citizens of their home country and, for diversity purposes, of the state of domicile. Karazanos v. Madison Two Assocs., 147 F.3d 624, 627 (7th Cir. 1998); 28 U.S.C. § 1332(a). Although Plaintiff does not specifically allege that he was domiciled in California at the time he filed this action, the facts of this case indicate that Plaintiff lived and worked in California at the time of his arrest. Thus, Plaintiff has established that the parties have complete diversity of citizenship.

However, at the conference the Court found that Plaintiffs proof of damages is not supported by the law nor is there sufficient evidence for a reasonable jury to find, (1) that a constitutional violation occurred, (2) that Plaintiff has met the $75,000 minimum amount in controversy requirement, and (3) that Plaintiff had suffered any damages. Accordingly, the Court lacks jurisdiction over Plaintiffs state law claims.

2. Insufficient Evidence to Establish State Law Claims

Even assuming that the Court did have jurisdiction over Plaintiffs state law claims, the Court found that Plaintiff does not have a sufficient evidentiary basis for a reasonable jury to find in his favor on liability issues on the state law claims in Counts 2, 3, 6, 9, 10, 21 and 24. Assuming the truth of the allegations that the items at issue in fact existed and were seized, Plaintiffs evidence will not support a claim for common law theft or conversion because he voluntarily provided the officers with the items which

he now complains should not have been seized.

III. Plaintiffs Motion for New Trial

Plaintiff moves for a new trial, arguing, inter alia, that this Court misapplied the law, misinterpreted his claims, and failed to read the record (Doc. No. 557). Plaintiff contends that the harmless error doctrine should not have been applied to this civil case, where harmless error does not apply to the violation of constitutional rights (jsi, at 3).

The Court did not apply the harmless error doctrine to Plaintiffs § 1983 claims. Instead, the Court examined the applicability of harmless error and of gerps. (or structural) error in the discussion of Plaintiffs claims, all arising out of the allegedly invalid search and seizure, because it was necessary to determine whether these claims were barred by their relation to his criminal conviction. am supra.

Plaintiff also contends that the Court did not rule on several of his claims and asks for a ruling on those claims (Doc. No. 557 at 5-7). To the contrary, the Court ruled at the conference that all federal law claims and all state law claims are dismissed for the reasons set out in this Order.

Accordingly, Plaintiffs Motion for New Trial (Doc. No. 557) will be denied.

IT IS ORDERED:

That Defendants' Motion for judgment as a matter of law pursuant to Rule 50(a), Fed.R.Civ.P. is **GRANTED** because Plaintiff has no sufficient evidentiary basis for a reasonable jury to find in his favor on any claim. Plaintiffs claims and the Fifth Amended Complaint are therefore DISMISSED in their entirety; Additionally, and in the alternative, that Plaintiffs federal claims (Counts 1,5,14, 16, 17, 19, 29, 31, 37 and 43) are

DISMISSED WITHOUT PREJUDICE until such time as Plaintiffs conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus;
Additionally, and in the alternative, that Plaintiffs state law claims (Counts 2, 3, 6, 9, 10, 21 and 24) are **DISMISSED** for want of jurisdiction;
That Plaintiffs Motion for New Trial (Doc. No. 557) is **DENIED;**
That all other pending motions are **DENIED AS MOOT**; and
That the Clerk of Court shall enter judgment accordingly.

DATED this 10th day of October, 2003.

S/D _____
ROSLYN O SILVER
United States District Judge

FILED COPY
OCT 16, 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al., Defendants,	)	
	)	

Court Verdict(s). This action came before the Court sitting without a jury. The issues have been heard and reviewed, the Court now enters its verdict(s).

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED having granted Defendants' Motion for judgment as a matter of law pursuant to Rule 50(a), Federal Rules of CMI Procedure because the Plaintiff has no sufficient

evidentiary basis for a reasonable jury to find in his favor on any claim. Plaintiffs claims and the Amended Complaint are therefore dismissed in their entirety. Additionally, and in the alternative, that Plaintiffs federal claims (Counts 1, 5, 14, 16, 17, 19, 29, 31, 37 and 43) are dismissed without prejudice until such time as Plaintiffs conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. Additionally, and in the alternative, that Plaintiff's state law claims (Counts 2, 3, 6, 9, 10, 21 and 24) are dismissed for want of jurisdiction. Plaintiff shall take nothing.

DATED this 16th day of OCTOBER, 2003.

S/D_____
RICHARD H WEARE
US District Court Clerk

FILED COPY
SEPT 27, 2004
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati,)	
Plaintiff,)	
v.)	
)	**ORDER**
Gunn McKay, et al.,)	
Defendants,)	
)	

Plaintiffs Motion for Change of Judge (Doc. No. 575) having been denied by United States District Judge Roger G. Strand (Doc. No. 593), the related motions to reassign case and to direct the Clerk of Court to comply (Doc. Nos. 589, 592) will be denied as moot. The Court now considers the remaining pending motions.

A. **Plaintiffs Motion for Reconsideration**

Plaintiff moves for reconsideration of the Rulings entered at the September 17, 2003 Final Pretrial Conference and memorialized in the October 16, 2003 Order. The pending Motion for Reconsideration (Doc. No. 566) again urges the grounds presented in the Motion for New Trial (Doc. No. 557), which was denied in the

October 16, 2003 Order (Doc. No. 562). The pending Motion for Reconsideration will be denied.

Motions for reconsideration should be granted only in rare circumstances. Defenders of Wildlife v. Browner, 909 F. Supp 1342, 1351 (D.Ariz. 1995). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." School Dist. No. 1 J. Multnomah County v. ACandS, Inc. 5 F.3 d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1994). The Court finds no clear error or manifest injustice that would necessitate reconsideration of the Order dismissing this action.

B. Other Pending Motions

Defendants move to strike Plaintiffs Motion for New Trial. Because Plaintiffs Motion for New Trial has already been decided (see Doc. No. 562), Defendants' Motion to Strike (Doc. No. 565) will be denied as moot.

Plaintiffs Motion to Judicially Notice Decisions (Doc. No. 568) and Defendants' Motion to Strike Reply (Doc. No. 577) will be denied as moot.

Pursuant to Local Rule 1.10(o), Plaintiff has submitted notices of pending matters and moved that the Court rule on his motions. Because all pending matters are addressed by this Order, Plaintiffs Motion to Decide Pending Matters (Doc. No. 576), Motion for Ruling (Doc. No. 583), and Motion for Ruling (Doc. No. 586) will be denied as moot.

IT IS THEREFORE ORDERED:

(1) That Plaintiffs Motion for Reconsideration (Doc. No. 566) is denied;

(2) That Defendants' Motion to Strike Plaintiffs Motion for New Trial (Doc. No. 565) is

denied as moot;

(3) That Plaintiffs Motion to Judicially Notice Decisions (Doc. No. 568) is denied as moot;

(4) That Defendants' Motion to Strike Reply (Doc. No. 577) is denied as moot;

(5) That Plaintiffs Motion to Reassign Case to Another Judge (Doc. No. 589) and Motion to Direct the Clerk of Court to Comply With Document 588 and Reassign Case at Random (Doc. No. 592) are denied as moot; and

(6) That Plaintiffs Motion to Decide Pending Matters (Doc. No. 576), Motion for Ruling (Doc. No. 583), and Motion for Ruling (Doc. No. 586) are denied as moot.

DATED September 24, 2004.

S/D

MAR H MURUGUIA for
ROSLYN O SILVER
US DISTRICT COURT JUDGE

FILED COPY
OCT 26 1993
CLERK S DISTRICT
COURT CALIFORNIA

IN THE 'UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

)	No. CV 93-2781 ER(B)
Anant Kumar Tripati,)	
Plaintiff,)	
vs.)	
)	**ORDER**
Gunn McKay, et al.,)	
Defendants,)	
)	

Plaintiff's Motion for Partial Summary Judgment, came on for decision before the Magistrate Judge on October 19, 1993, without oral argument. An opposition and Reply was received. After careful consideration of the papers heretofore filed, plaintiff's Motion is hereby denied.

Summary judgment is authorized if the moving party shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed.R.Civ.P 56(c). Once the moving party has met this initial burden the nonmoving party has the subsequent burden of presenting significant probative evidence tending to support its claim that material triable issues of fact remain. Id.

Plaintiff moves this Court for summary judgment based

on the following grounds: 1) defendants failed in their answer to assert any affirmative defenses; 2) only defendants Chatfield and Conrad filed an opposition to plaintiff's motion[5]; and 3) defendants failed to file a statement of Genuine Issues of Material Facts as required under Local Rule 7.14.2.[2]

By order dated October 5, 1993, the Magistrate Judge allowed all defendants' to file their First Amended Answer, which contained affirmative defenses to all of plaintiff's allegations. Furthermore, under the summary judgment rule, the party against whom the motion is directed need not file any contravening affidavits or other material, but is entitled to a denial of the motion where the movant's papers are insufficient on their face or themselves demonstrate the existence of a material issue of fact. *See* Henry v. Gill Industries, Inc., 983 F.2d 943, 949 (9th Cir. 1993). Hamilton v. Keystone Tankshin Corp., 539 F.2d 684, 686 (9th Cir. 1976)

The Magistrate Judge finds that on their face, plaintiff's papers are insufficient and that genuine issue as to material facts exist

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1 The Magistrate Judge agrees with Plaintiff that no opposition was filed on behalf of Maricopa county Attorney and Maricopa County. Furthermore, the Magistrate judge notes that Defendant's attorneys are guilty of sloppy lawyering and that in the future if they are not more careful, their actions may result in negative consequences for their clients.

2 The fact that Defendants failed to comply with local rule 7.14.2 is as another example of sloppy lawyering.

and that plaintiff is not entitled to judgment as a matter of law. It is therefore ordered that plaintiff's Motion for Partial Summary Judgment be, and is hereby denied.

Dated: October 25, 1993.

S/D_____
VOLNEY V. BROWN, JR.
United States Magistrate Judge

FILED COPY
MAR 28, 1994
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,)	
v.)	
)	**ORDER**
Gunn McKay, et al., Defendants,)	

Based upon the stipulation of the parties [Docket # 79], IT IS SO ORDERED that:

1. On or before March 30, 1994, Defendants shall respond fully to all discovery pending as of February 19, 1994, all objections to said discovery having been waived.
2. Defendants shall respond in a timely manner to any discovery requests propounded by Plaintiff within 30 days following receipt of the response ordered in paragraph 1.
3. All costs of Discovery as ordered in paragraphs one and two above shall be borne

by Defendants.

4. Plaintiff's Motion to Compel [Docket #75] is denied without prejudice.

DATED this 17th Day of March 1994.

S/D_____
STEPHEN L VERKAMP
United State magistrate Judge

FILED COPY
MAR 28, 1994
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati,)	
Plaintiff,)	
v.)	
)	**ORDER**
Gunn McKay, et al.,)	
Defendants,)	
)	

ORDER ADOPTING STIPULATION EXTENDING TIME FOR EXTENSION

AS STIPULATED BY THE PARTIES, IT IS HEREBY ORDERED THAT:

Defendants shall have to and including June 1, 1994 in which to comply with Document 79. This extension is granted as defendants have changed counsel and it will take counsel about sixty days to fully comply. Defendants shall file notice of compliance by June 1, 1994.

The Discovery cut off date was January 10, 1994, the pre trial order is due May 18, 1994 and last date for motions was March 11, 1994.

DATED: April 6, 1994

S/D_____
HON STEPHEN L VERKAMP
US MAGISTRATE JUDGE

FILED COPY
March 30 1995
CLERK US DISTRICT
COURT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

Anant Kumar Tripati, Petitioner vs. GUNN McKAY, et al., Respondents.	No. CIV-94-0170-PHX-ROS **ORDER**

I. INTRODUCTION AND BACKGROUND

Plaintiff, appearing pro se and presently incarcerated at ASPC-Florence, has brought a 54 count complaint pursuant to 28 U.S.C. §§ 1981, 1983, 1985(3) and 1986. In his complaint, Plaintiff alleges various constitutional violations arising out of events leading to his arrest and conviction. Defendants have filed a motion for judgment on the pleadings. Plaintiff has filed a cross-motion for summary judgment. For the reasons set forth below, Defendants motion will be granted in part and denied in part, and Plaintiffs motion will be denied.

II. ANALYSIS

A. Motion for Judgment on the Pleadings

Defendants have filed a motion styled Motion for Judgment on the Pleadings. A motion for judgment on the .pleadings brought pursuant to Rule 12(c), Federal Rules of Civil Procedure, challenges the legal sufficiency of the opposing party's pleading. To make such a determination, the truthfulness of the material facts alleged in the responding party's pleading, and all inferences reasonably drawn from that fact must be construed in favor of the responding party. Norman v. General Motors Corp., 628 F.Supp. 702, 703 (D.Nev. 1986). A judgment on the pleadings is not appropriate where the complaint alleges facts, which if proved, would permit recovery. Wager v. Elm, 575 F.2d 882, 884 (D.C. Cir. 197.6). A judgment on the pleadings is appropriate only when there is "no unresolved issue of fact and no question remains that the moving party is entitled to judgment as a matter of law: Blankenship v. Hearst Corp., 519 F2d 418, 423 (9th Cir. 1975).

Defendants have attached to their motion copies of documents relating to criminal matters in Superior Court involving Plaintiff. A court can take judicial notice of matters of public record on a motion to dismiss. Mack v. South Bay Beer Distributors. Inc., 798 F.2d 1279 (9th Cir. 1986). The Court finds that this rule is equally applicable to a motion for judgment on the pleadings.

B. Res Judicata and Collateral Estoppel

Defendants first argue that Counts. 1-14, 16, 29, 30, 36 and 50 of Plaintiff's Second Amended Complaint are barred by the doctrines of res judicata and collateral estoppel. Plaintiff contends that Defendants waived this defense by failing to include it in their

answer to Plaintiff's Second Amended Complaint. It is true that res Judicata and collateral estoppel are affirmative defenses that must be specifically pled pursuant to Rule 8(c), Federal Rules of Civil Procedure: However, the Ninth Circuit has taken the position that these defenses may be raised for the first time in a motion for summary judgment where the Plaintiff has, failed to show prejudice. See Camarillo v. McCarthy, 998 -F.2d 638 (9th Cir. .1993): The Court notes that .the parties previously entered into a stipulation whereby Plaintiff agreed to withdraw his motion for sanctions in exchange for allowing Defendant to file an amended
answer not including the defenses of res judicata and collateral estoppel.[6] Consequently, there lies a potential for prejudice. However, the Court is unable to determine at this point in time whether Plaintiff will suffer prejudice if Defendants are now allowed to raise this defense because neither party addressed this issue.

Furthermore, although the Court can take judicial notice of the California criminal• proceedings involving Plaintiff, the Ninth Circuit has explained that "before an action may be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that-the defense of res judicata appear

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6 Defendants did not plead these defenses in their original answer nor in their Answer to Plaintiff's First Amended Complaint. Defendants did include these defenses in their First Amended Answer to Plaintiff's First Amended Complaint. Plaintiff then brought a • motion for sanctions pursuant to Rule 11, Federal Rules of Civil Procedure, on the ground that. Defendants did not conduct an adequate investigation before alleging these defenses. The parties then stipulated that (1) Plaintiff could .file a second amended complaint, (2) Plaintiff would Withdraw his motion for sanctions, and (3) Defendants would file an answer only including the defenses set forth in their 'Answer to Plaintiff's Amended First Amended Complaint.

from the face of the complaint or that the record of the prior case be received in evidence." Guam Investment Company v. Central Building. Inc., 288 F.2d '19 (9th Cir. 1961). In. this case, the defense of res judicata is not apparent from the face of the complaint, and Defendants have not provided the record of the prior proceedings. Although the court in 'Guam referred only to the doctrine .of res judicata, this Court finds that the "reasons for the rule in Guam 'with respect to dismissal on res judicata grounds are equally applicable, to dismissal on the grounds of collateral estoppel. Consequently, the Court will deny Defendants' motion with respect to these defenses.

C. Plaintiff has not brought a claim against the Maricopa County Board of Supervisors.

Defendants contend that the Maricopa County Board of Supervisors is statutorily immune from claims such as Plaintiff brings. A review, of Plaintiff's Second Amended Complaint confirms Plaintiff's assertion that he has not sued the Maricopa County Board of Supervisors.

D. Plaintiff's discrimination claims

Plaintiff contends that the individual defendants, in accordance with the prevailing customs, traditions and policies of the Maricopa County Attorney's Office and Maricopa County, targeted Plaintiff for criminal investigation and prosecution because he is a member of a minority group and conspired to deny him the equal protection of the law in violation of 42 U.S.C 1981, 1985(3) and 1986.

To the extent that Defendants contend that these counts should be dismissed on res judicata and collateral estoppel grounds, that argument must fail for

the 'reasons set forth supra.

Defendants also contend that Plaintiff cannot succeed on the theory that Defendants' infringed upon his constitutional rights because of the establishment of an unconstitutional policy.

Defendants cite Havnesworth v. Miller,. 820 F.2d 1245 '(D.C.Cir. 3.987) in which the court explained that government officials may be held liable for damages for constitutional infringements resulting from their establishment of constitutional policies but the Plaintiff must prove that the official against whom he is asserting liability had the authority to formulate the policy and exercised that authority to promulgate the policy.The Court finds Havnesworth to be inapposite because the Court does not read Plaintiff's complaint as attempting to impose liability against the individual 'defendants based upon their formulation of an unconstitutional policy.

Defendants also cite Oswu v. Grzvb, 749 F.Supp. 897 (N.D. Ill. 1990), in which the court explained that a municipality could not be held liable for civil rights violations engaged in by police officers absent evidence that the municipality had an officially adopted policy pursuant to which the officers acted. In the Ninth Circuit, a plaintiff can establish municipal liability in three ways. First, the plaintiff can prove that the municipal employee committed the alleged constitutional violation "pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (internal citations omitted). Finally, the plaintiff may prove that an official with final policy-making authority "ratified a

subordinate's unconstitutional decision or action and the basis for it." Id.

Liberally construing Plaintiff's pro se complaint, Plaintiff contends that Maricopa County has a longstanding policy of targeting minorities for criminal prosecutions. If such allegation was true, the Maricopa County could be held liable if the individual defendants violated Plaintiff's rights by acting pursuant to this policy. A judgment on the pleadings is appropriate only when there is no unresolved issue of fact and no question remains that the moving party is entitled to a judgment as a matter of law. Blankenship v. Hearst Corp., 519 F. 2d 418, 423 (9th Cir. 1975). The Court finds that a factual issue remains of whether or not Maricopa County has a policy of targeting minorities for prosecution. Consequently, Defendants are not entitled to judgment on the pleadings with respect to Plaintiff's discrimination claims.

E. Abstention

Defendants begin their argument on abstention by citing two cases that do not address the doctrine of abstention but rather address the applicability of the doctrines of res Judicata and collateral estoppel to § 1983 suits.[7] As already explained, it is not appropriate

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[7] For example, in Allen v. McCurry, 101 S.Ct. 411, 141 (1980) the Supreme Court merely held that the court of appeals erred in finding that the plaintiff's inability to obtain federal habeas relief upon his Fourth Amendment claim rendered the doctrine of a collateral estoppel inapplicable to his § 1983 suit. See also Munz v. Parr, 972 F.2d 971 (8th Cir. 1992) (district court did not err in dismissing § 1983 claim on collateral estoppel grounds where court found plaintiff had full and fair opportunity to

based on the record presently before the Court to enter judgment in favor of Defendants on res Judicata or collaterol estoppel grounds.

The Court also questioned the continued validity of the cases cited by Defendants for the proposition that § 1983 claims relating to the validity of the plaintiff's confinement are subject to an exhaustion requirement. As the Supreme Court explained in Heck v. Humphrey 114 S. Ct. 2364, 2370 (1994), "we see no need to abandon...our teaching that § 1983 contains no exhaustion requirement beyond what Congress provided." The Supreme Court explained:

> The issues with respect to monetary damages challenging conviction is not it seems to us, 'exhaustion; but rather, the same as the issue .was with respect to injunctive relief challenging conviction in Preiser: whether the claim is cognizable under § 1983 at all. We conclude that it is not.

Id. at 2371.

In Heck, the Supreme Court directed lower courts to consider whether -or riot a judgment in favor of a plaintiff in a § 1983 action "would necessarily imply the invalidity of his conviction or sentence." Id. at 2372. If it would, and the plaintiff is unable to show that his conviction or sentence has been expunged, the action must be dismissed. Id. If a judgment in favor of the plaintiff would not "necessarily imply the invalidity of the plaintiff's

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challenge search in criminal proceeding.

conviction or sentence, then .the action should proceed ' "in the absence of some other bar to' the suit." Id. at 2372-2373. As an example of an instance where a judgment in favor of the plaintiff would not necessarily .imply the invalidity of the plaintiff's conviction or sentence, the Supreme Court pointed to a suit for damages attributable to an allegedly unreasonable 'search. The Court explained that because of the independent source, inevitable discovery and harmless error doctrines, "such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful." Id., at 2372 n. 7. This footnote could be read as suggesting that if a § 1983 action is predicated upon a Fourth Amendment violation and the independent source, inevitable discovery or harmless, error doctrines do not apply, then the action should be dismissed because a judgment in favor of the plaintiff on that claim would imply that the. plaintiff's conviction was unlawful. The Court finds that Heck does not provide authority for the dismissal of Plaintiff's claims at this time because the applicability of the factual basis for the convictions in this case is unclear.

Finally, Defendants appear to contend that this Court should abstain pursuant to Younger v. Harris, 91 S.Ct. 746 (1971). Defendants cite Feaster v. Miksch, 846 F.2d 21 (6th Cir. 1988).and Doby v. Strength, 758 F.2d 1405 (11th Cir. 1985) in support of their position that this court should abstain. In Feaster, the plaintiff brought a § 1983 action for damages in which she claimed that the defendants violated her constitutional rights in their execution of a search warrant. The Sixth Circuit found it was - appropriate to 'stay the "action

because "when disposition of a federal action for damages necessarily requires the resolution of issues that will determine the outcome of pending state criminal proceedings, Younger requires that the federal action not proceed." 846 F.2d at 24.

Similarly, in Doby, the petitioner filed a complaint pursuant to 1983 alleging violations arising out of his arrest and the search and seizure of his home. The magistrate dismissed the case because he found that the § 1983 action was actually an attack his state court petition and therefore must be brought as a writ of habeas corpus. . The Eleventh Circuit reversed the dismissal on the ground that habeas corpus was not the proper ground for bringing the plaintiff's claims because Fourth Amendment 'claims are not generally cognizable in federal habeas corpus actions. The Eleventh Circuit remanded the case to the district court with orders that the court "abstain from resolving the merits of petitioner's claims under the Georgia Court of Appeals rules on the relevant issues.,"[8]

Abstention under Younger is appropriate if (1) there is an ongoing state proceeding in which the same question is at issue, (2) the proceeding implicates important state interests, and (3) the state proceeding provides an adequate opportunity. to raise the federal questions. Fresh International Corn. v. Agricultural Labor Relations Board, 805 F.2d 1353, 1358 (9th Cir. 1986).. In the Ninth Circuit, if Younger is found to apply, the action is to be dismissed. Id.; cf. Feaster v. Miksch, 846 F.2d 21 (6th Cir. 16 fl 1988) (action stayed).

Amongst other things, Plaintiff contends that his

---

[8] The petitioner's conviction was being reviewed by the Georgia Court of Appeals.

arrest in California was illegal, that he was not arraigned in accordance with: Arizona Rules of Criminal Procedures, that inadmissible hearsay was introduced at his trial, and that he was denied effective assistance at trial. Defendants contend, and Plaintiff does not deny, that Plaintiff presently has actions challenging his conviction pending in the state courts. Plaintiff does not deny that the same issues are being addressed in the state actions. The
Court finds that there is an important state interest in passing on the constitutionality of Plaintiff's claims because the resolution of these claims directly impacts a state criminal proceeding. The court also finds that the state proceedings in this case provide Plaintiff an adequate opportunity to raise his claims. See Kugler v. Helfant, 95 S. Ct. 1524, 1531 (1975) (The policy of equitable restraint expressed in Younger v. Harris, in short, is found on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights"), cf. Stone v. Powell, 96 S. Ct. 3037 (1976) (Fourth Amendment claims are not generally cognizable in federal habeas corpus actions).

Plaintiff contends that a federal court should not abstain pursuant to Younger in the absence of a competent state tribunal. See Kugler, 95 S. Ct. 1t 1531 n.4. While this may be law, Plaintiff has failed to provide establish that the state courts are not competent to resolve these matters in the first instance. Consequently, the court finds that it is inappropriate to abstain pursuant to Younger and to dismiss Plaintiff's complaint to the extent that it raises issues that are presently being considered by the Arizona state court.

Plaintiff's Cross Motion for Summary Judgment

Plaintiff contends that because Defendants have failed to show that they are entitled to judgment; the Court should enter judgment in his favor. When cross-motions for judgment are filed, whether they be motions for judgment on the pleadings or motions for summary judgment; each motion must be considered on its own merit, and both may be denied because genuine factual deputes remain, See Shook v. U.S., 713. F. 2d 662, 665 (11th Cir. 1983). Courts may not resolve such factual disputes on cross-motions' any more than the. Court could on a single motion. See. ITCO Coro. v. Michelin Tire Corp Commercial Div., 722 F.2d 42,.45 n-3 (4th Cir. 1983), cert. denied, 469 U.S. 1215 (1985).

On summary judgment, the moving party must establish the absence of a genuine issue of material fact. Celotex Coro. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986). Plaintiff has failed to do-so: Consequently, Plaintiff's motion will be denied.

Accordingly,

IT IS ORDERED granting in part and denying in part Defendant's motion for judgment on the pleadings: Plaintiff s claims involving issues, identical to' those presently raised in his pending state proceedings are dismissed pursuant to the doctrine of abstention set forth in Younger v. Harris.

FURTHER ORDERED denying Plaintiff's Motion in Limine; Cross Motion for Summary Judgment (doc.#134).

DATED this 24th of March, 1995.

S/D_____
HONORABLE ROSLYN O. SILVER
U.S DISTRICT COURT JUDGE

Copies of all counsel of record

FILED COPY
SEPTEMBER 30, 1996
CLERK US DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT FOR THE, DISTRICT OF ARIZONA

Anant Kumar Tripati,	)	No. CIV 94-170-PHX-ROS (BGS) (LEAD)
	)	No. CIV 94-504 PHX-ROS (BGS)
	)	No. CIV 95-702 PHX-ROS (BGS) (Consolidated)
vs.	)	**MEMORANDUM OF DECISION AND ORDER**
State of Arizona, et al., Defendants.	)	

Pending before the Court is Defendants' Motion. for Summary Judgment (Document No. 251),

BACKGROUND

On May 13, 1993, Plaintiff' filed a pro se Complaint (cause number CIV 94-170-PHX-ROS (BGS) and-hereafter.the""McKay Case") in the United States District Court for the Central District of California. The Complaint raised issues of Unconstitutionality related to Plaintiff' s Arizona state criminal proceedings including arrest, search and seizures, trial,

and sentencing. On December 3, 1993, the McKay case was transferred to the District of Arizona. On May 23, 1994, Defendants filed a Motion for Judgment on the Pleadings. On March 30, 1995, the Court granted Defendants' Motion in part, dismissing all claims except Plaintiff's claim that 'the Maricopa County Attorney's Office has a long-standing 'policy of targeting minorities for criminal investigation, arrest and prosecution and that the individual Defendants acted pursuant to that policy in prosecuting Plaintiff.

Plaintiff also filed two additional Complaints related to the issues raised in the McKay Case. On March 8, 1994 Plaintiff filed a pro se 'Complaint in cause number CIV 94-504-PHX-ROS (BGS) (hereafter the "Forfeiture Case") and on April 7, 1995, Plaintiff filed a pro se Complaint in cause number CIV 95-702-PHX-ROS (BGS) (hereafter the "Insurance Case").

On June 19, 1995, the Court consolidated the Forfeiture Case and the Insurance Case with the McKay Case. On July 18, 1995, Plaintiff filed a Third Amended Complaint essentially restating the issues raised in the Forfeiture Case and the Insurance Case. Interalia, The Third Amended Complaint asserts that Defendants acted without probable cause in seizing Plaintiff's property and filing civil forfeiture proceeding against that property and that Defendants caused the Arizona Department of Insurance to issue a Cease and Desist Order against Plaintiff without cause.

On, November 13, 1995, Defendants filed a Motion for Summary Judgment on the consolidated case.

STANDARD OF REVIEW

Summary judgment is appropriate when the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." Fed.R.Civ.P.56(c); California. Architectural Building Products, Ina. v. Franciscan Ceramic,' Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert denied, 484 U.S. 1006 (1998).

The absence of a genuine issue of material fact may be demonstrated by pointing out to the court that "there is an absence of evidence to support the nonmoving party's case" on issues where the nonmoving party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S 317, 321 (1986). If the nonmoving party bears the burden of proof at trial as to any element essential to his case, that party can withstand a motion for summary judgment only by making a showing sufficient to establish a genuine issue of fact regarding that element. Id.

DISCUSSION

I. McKay Case

Plaintiff alleges that the Maricopa County Attorney's Office has a long-standing policy of investigating, arresting, and prosecuting individuals based upon minority status. (Pl.'s Second Am. Compl. At "AB", p.48) Plaintiff alleges that he was investigated, arrested and prosecuted pursuant to that policy because he is East Indian. (Id.) Plaintiff further alleges that the Maricopa County Attorney's Office and individual Defendants targeted, investigated, arrested and prosecuted him because he was seeking to disclose the Maricopa County Attorney's Og/Grand Jury Bureau office policy related to minorities. (Pl.'s Second Am. Compl. At "A".)

Defendants assert that Plaintiff was not targeted, arrested or prosecuted pursuant to any policy targeting minorities for prosecution. (Defs. Mot Summ. J. at 11.) To support this proposition, Defendants cite

to the affidavit of E.Miles Nielson, the Maricopa County Attorney's Office Bureau Chief of the Charging (Defs. SSF at 1-2) In his Affidavit, E. Miles Nelson, asserts that the standard used by the Maricopa County Attorty's Office to charge a person with a crime is a "reasonable likelihood of conviction at trial" standard. (Nielson Aff. At 2). Nelson also asserts that the Charging/Grand Jury Bureau has never utilized a standard for investigating, charging, or prosecuting individuals based upon his minority status. (Chaitifield Aff. At 4-5; Harris Aff. At 4.)

Plaintiff responds with his Affidavit. (Pl.'s SSP at Exh. A). In his Affidavit, Plaintiff asserts that Defendant Archuleta, a paralegal with the Maricopa County Attorney's office, told Plaintiff that certain individuals had targeted Plaintiff because he "was a 'sand nigger' who had to be restrained[.]" (Tripati Aff. At 5.) Plaintiff also asserts that Defendant Archuleta confirmed to Plaintiff that it was the policy of Maricopa County to target minorities for arrest and prosecution. (Tripati Aff. At 2.) Accordingly, Defendants have failed to demonstrate that no genuine issue of fact exists or that they are entitled to judgment as a matter of law. Defendant's motion for Summary Judgment is denied as to the claims still pending in the McKay case.

II. Forfeiture Case

Plaintiff claims that Defendants obtained a warrant to seize property at his business and initiated forfeiture proceedings on that property without probable cause. (Pl.'s Third Am. Compl. At Attach: a-k) Plaintiff further alleges that he prevailed in the state forfeiture proceeding. (Id. At d.)

In their Motion for Summary Judgment, Defendants assert that Plaintiff's property was seized

and removed from California to Arizona pursuant to Arizona and California valid search warrants. (Id.; Defs.' SSF AT 3-4.) In his Affidavit, Defendant Chaitfield states that he set forth the necessary probable cause for the warrants to issue based on his investigation of Plaintiff. (Chaitfield Aff. At 2.) Chaitfield asserts that he had no discussion with any Maricopa County Attorney's Office employee related to investigating or prosecuting Plaintiff based upon his minority status. (Chaitfield Aff. At 4-5.)

Similarly, Defendants asserts that they instituted forfeiture proceedings based upon probable cause. (Defs.' Mot. Summ. J. at 5.) In his Affidavit, Harris asserts that he instituted forfeiture proceedings based upon Plaintiff's criminal conviction and had no discussion with any Maricopa County Attorney's Office employee related to prosecuting Plaintiff's civil forfeiture based upon his minority status. (Harris Aff. At 4-5)

In his Response, Plaintiff asserts that Defendant Archuleta, a paralegal with the Maricopa County Attorney's Office, told Plaintiff that certain individuals had targeted Plaintiff because he was a 'sand nigger' who had to be restrained (.)" (Tripati Aff. At 5.) Plaintiff also asserts that Defendant Archuleta stated that the seizure and forfeiture of his property was a result the Defendants targeting of Plaintiff. (Tripati Aff. At 5.)[9]

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[9] Plaintiff also argues that Defendants failed to produce any evidence showing that they had the authority to size and remove Plaintiff's property prior to the search and removal. Attached to Defendants' Reply, however, is a Return of Search Warrant authorizing the search and removal one day

The court finds that Defendants have failed to demonstrate that there are no genuine issues of material fact related to this issue.

Defendants also assert that they are entitled to qualified immunity pursuant to A.R.S. § 13-4314 (e). (Defs' Mot. For Summ. J. at 6). This immunity applies only if "it appears that there was reasonable cause" for the seizure for forfeiture or the filing of the notice of pending forfeiture. A.R.S. § 13-4314 (e). Here, however, because there is a genuine issue of material fact related to the reasonableness of the seizure, Defendants have failed to demonstrate that there is no genuine issue of material fact and that they are entitled to summary judgment as a matter of law as to this issue.

Finally, Defendants assert that this court must abstain from any claim related to the forfeiture proceedings that challenges Plaintiff's criminal conviction under Younger abstention doctrine.[10] (Defs' Mot Summ J. at 7-8.) Defendants, however, have not identified the claims related to Plaintiff's 2 forfeiture proceeding meet the Younger criteria. Accordingly, Defendants have failed to demonstrate that they are entitled to judgment as a matter of law to this issue.

Overall, Defendants have failed to demonstrate that there are no issues of material fact and that they are entitled to judgment on a matter of law as to the claims pending in the Forfeiture Case.

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prior to the search and removal. (Defs.' Supp. SSF at Exh. A.)

[10] Younger v. Harris, 401 U.S. 37 (1971).

III. Insurance Case

Plaintiff asserts that-the Arizona Department of Insurance (ADOI) issued a Cease and Desist Order against Plaintiff solely at the request of certain individual Defendants to punish Plaintiff because he challenged Defendants' actions and because he was a racial minority.[11] (Pl.'s Third Am. Compl. At "c"; Pl.'s SSF at 9.) Therefore, Plaintiff asserts that these individual Defendants have maliciously prosecuted him. (Id. At "c" – "d'.)

Defendants assert that the ADOI independently concluded that the Cease and Desist Order was proper. (Defs.' Mot. For Summ. J at 8-9; Reply at 4.) Defendants cite to the Affidavit of Susan Gallinger, the former Director of the Arizona Department of Insurance and the individual who issued the Cease and Desist Order. (Defs.' -SSF át-7-9.)

In the Affidavit, Gallinger states that, as Director of the Arizona Department of Insurance, she had the authority to issue a Cease and Desist Order based upon her belief that an entity was unlawfully transacting insurance in Arizona. (Gallinger Aff. at 2.) Gallinger states that she formed the belief that Plaintiff was unlawfully transacting insurance in Arizona and issued the Cease and Desist Order against him "[b]ased upon information and documentation obtained by the Department of Insurance, verified records of the Department and the Department's own investigation[.]" (Id.)

Plaintiff claims that the Gallinger Affidavit is a false. (Pl.'s Resp.. at 9-10; Pl.'s SSF at 9.) As proof of the Affidavit's falsehood, Plaintiff notes that statement

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[11] Susan Gallinger and the Arizona Department of Insurance are not Defendants in this action.

by Gallinger that she had no conversations with individual Defendants related to issuing the Cease and Desist Order based upon Plaintiff's race or to harass Plaintiff for any reason. Plaintiff asserts that Gallinger did have- conversations with certain individual Defendants about Plaintiff. (Id.) Plaintiff cites to correspondence sent to and from Gallinger which includes remarks about Plaintiff's' ongoing criminal proceeding, correspondence from Defendant Chaitfield to an ADOI investigator, and memoranda discussing the risk of pursuing a Cease and Desist order against Plaintiff. (Pl.'s SSF at Exh. 0 and N.)

The Court's review of the Affidavit of Susan Gallinger indicates that Gallinger did' not assert that she had no conversations with individual Defendants about Plaintiff. Instead, Gallinger asserts only that she had no conversations with individual Defendants related to issuing the Cease and Desist Order based upon Plaintiff's race or to harass Plaintiff for any reason. (Gallinger Aff. at 3-4.) The letters and memoranda cited to by plaintiff do not contradict this statement. Accordingly, Plaintiff has failed to demonstrate a material issue of fact related to Gallinger's assertion that she issued the Cease and Desist Order based upon her belief that Plaintiff was unlawfully conducting insurance.

Further, to the extent Plaintiff attempts to make a conspiracy claim between Gallinger and Defendants by introducing the letters and memoranda, Plaintiff has failed. "A mere allegation ofconspiracy without factual specificity is insufficient." Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988). To state a conspiracy claim, a plaintiff must allege material facts that show the existence of an agreement

or "meeting of minds." Woodrum v. Woodward County, 866 F. 2d 1121, 1126 (19th Cir. 1989) (affirming dismissal where plaintiff provided only conclusory allegations of conspiracy); Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989). The evidence provided by Plaintiff to contradict Gallinger's Affidavit does not rise to the level needed to show a conspiracy.

Defendants have demonstrated that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law on the malicious prosecution claims related to the Cease and Desist Order. Accordingly, Defendants' Motion for Summary Judgment will be granted with respect to this claim.

CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (Doc. No. 251) is granted in part and denied in part. The motion is granted as to the malicious prosecution claims related to the Cease and Desist Order. The Motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendants shall brief, within 30 days from the date of this Order, the effect, if any, that Heck v. Humphry, 114 S. Ct. 12364 (1994) has on the remaining claims in this case. Plaintiff shall have 30 days from the filming of Defendants' brief to respond and Defendants shall have 15 days from the filing of Plaintiff's response to reply.

DATED this 30 day of September, 1996

S/D_____
ROSLYN O. SILVER
United States District Judge

Copies to Plaintiff and counsel of record

FILED COPY
JANUARY 22, 1997
CLERK US DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT
FOR THE, DISTRICT OF ARIZONA

	)	No. CIV 94-170-
Anant Kumar Tripati,	)	PHX-ROS (BGS)
Plaintiff,	)	(LEAD)
	)	No. CIV 94-504
	)	PHX-ROS (BGS)
	)	No. CIV 95-702
	)	PHX-ROS (BGS)
	)	(Consolidated)
vs.	)	**MEMORANDUM**
	)	**OF DECISION**
	)	**AND ORDER**
GUNN McKAY, et al.,	)	
Defendants.	)	
	)	

Pending before the court is Defendants' Legal Memorandum (Doc. No. 297) briefing the impact of Heck v. Humphrey, 114 S. Ct. 2364 (1994), on Plaintiff's remaining claims. Also pending is Plaintiff's Motion to Supplement Complaint (Doc. No. 303).

BACKGROUND

On March 8, 1994, Plaintiff filed a pro se Second Amended Complaint (cause number CIV 94-170-PHX-

ROS (BGS) and hereafter the "McKay Case" or the "McKay Complaint") raising issues of unconstitutionality related to Plaintiff's Arizona state seizure, trial, and sentencing. On May 23, 1994, Defendants filed a Motion for Judgment on the Pleadings. On March 30, 1995, the Court granted Defendants' Motion in part, dismissing all claims under Younger v. Harris[12] except Plaintiff's claim that the Maricopa County Attorney's Office has a long-standing policy of targeting minorities for criminal investigation, arrest and prosecution and that the individual Defendants acted pursuant to that policy in investigating, arresting, and prosecuting Plaintiff.

Plaintiff also filed two additional Complaints related to the issues raised in the McKay Case. On March 8, 1994, Plaintiff filed a pro se Complaint in cause number CIV 94-504-PHX-ROS (BIGS) (hereafter the "Forfeiture Case") and, on April 7, 1995, Plaintiff 12j filed a pro se Complaint in cause number CIV 95-702-PHX-ROS (BGS) (hereafter the "Insurance Case). On July 19, 1995, the Court consolidated the Forfeiture Case and the Insurance Case with the McKay Case and allowed Plaintiff to file a previously lodged Amended Complaint for the Insurance and Forfeiture Cases (hereafter "Forfeiture Complaint"). Inter alia, the Forfeiture Complaint asserts that Defendants acted without probable cause in seizing Plaintiff's property and filing civil forfeiture proceeding against that property and that Defendants caused the Arizona Department of Insurance to issue a Cease and Desist Order against Plaintiff without cause.

On November 13, 1995 Defendants filed a

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[12] 401 U.S. 37 (1971)

Motion for Summary Judgment in the consolidated case. On September 30, 1996, the Court issued an Order granting in part and denying in part Defendants' Motion for Summary Judgment. Specifically, the Court dismissed the Insurance Case and requested additional briefing on the impact of Heck v. Humphrey on Plaintiff's remaining claims.

DISCUSSION

I. Plaintiff's Motion to .Supplement McKay And Forfeiture

Plaintiff filed a Motion to Supplement pursuant to Rule 15(d), Federal Rules of Civil Procedure, and lodged a proposed "Supplemental Complaint." Supplemental pleadings are restricted to events occurring since initiation of the suit. See, e.g., Federal Deposit Insurance Corp. v. Knostman, 966 F. 2d 1133, 1138 (7th Cir. 1992). Here, the allegations raised in the supplemental Complaint includes allegations related to claims dismissed in the Court's Order of March 30, 1995. Plaintiff's Motion to Supplement Complaint is an improper attempt to amend his McKay and Forfeiture Complaint and will be denied.

II. Defendants' Supplemental Legal Memorandum on Heck v. Humphrey.

When a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Heck, 114 S. Ct. at 2372. If the plaintiff's § 1983 claim would imply the invalidity of his

conviction or sentence, the claim does not arise until the conviction or sentence, the claim does not arise until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus. Id. At 2373.

A. McKay Case.

Plaintiff's remaining allegations[13] in the McKay Complaint state that the Maricopa County Attorney's

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[13] In its Order of March 30, 1995, the Court noted that Plaintiff's McKay Complaint raised numerous claims relating to his state criminal trial, including extradition, arraignment, introduction of evidence, and effective assistance of counsel. (3/30/95 Order at 10.) Because Plaintiff did not deny Defendants' assertion that these same issues were being addressed in state court actions, the Court held that abstention from these issues was appropriate and dismissed these claims. (Id. At 11-12.) The Court also noted that Plaintiff's allegation that Maricopa County had a long-standing policy of targeting minorities for prosecution and that Plaintiff was targeted pursuant to that policy stated a viable claim. (Id. at 6.) Accordingly, although not specifically dismissed without prejudice pursuant to Younger in the Court's March 30, 1995 Order: Four; Five; Six; Seven; Eight; Nine; Ten; Eleven; Twelve; Thirteen; Fourteen; Seventeen; Eighteen; Nineteen; Twenty-one; Twenty-two; Twenty-three; Twenty-four; Twenty-five; Twenty-six; Twenty-seven; Twenty-eight; Twenty-nine; Twenty- Thirty; Thirty-one; Thirty-two; Thirty-three; Thirty-four, Thirty-five; Thirty-six; Thirty-seven; Thirty-eight; Thirty-nine; Forty- nine, Forty-one, Forty-two, Forty-three, Forty-four, Forty-six, Forty-seven, Forty-eight, and Fifty-three to the extent the "acts" alleged by Plaintiff include any specific acts alleged earlier in the Complaint and dismissed pursuant by Younger.

Office has a long-standing policy of investigating, arresting, and prosecuting individuals based upon minority status. (Pl.'s McKay Compl. At "A", p.48.) Plaintiff also alleges that he investigated, arrested and prosecuted pursuant to that policy because he is East Indian and because he was seeking to disclose the Maricopa County Attorney's Office policy related to minorities. (Id. At "AB".)

Plaintiff's claims related to his arrest, if proven true, do not necessarily imply the invalidity of his criminal conviction. Groman v. Township of Manalapan, 47 F. 3d 628, 626 (3d Cir. 1995); see Heck, 114 S. Ct. at 2372, n.7. Accordingly, these claims are not affected by Heck and may proceed.

Although Plaintiff's claim related to his investigation, if proven true, do not necessarily imply the invalidity of his criminal conviction, see Heck, 114 S Ct. at 2373, n.7, they must be dismissed. Unlike his arrest[14], Plaintiff could not show actual, compensable injury arising from the investigation that "does not encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned)." Id. (citing Memphis Community School Dist. V. Stachura, 477 U.S. 299, 308 (1986)). Accordingly, Plaintiff's § 1983 claims related to his investigation have not yet arisen under Heck and are dismissed without prejudice. Plaintiff may bring these claims after his criminal convictions have been overturned or otherwise invalidated.

Plaintiff's section 1983 claims related to the prosecution of his state criminal charges are in essence

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[14] Plaintiff's claim for false arrest permits damages for the "time of detention up until issuance or process or arraignment, but not more." Heck, 114 S. Ct. at 2371

a constitutional malicious prosecution claim. See Heck, 114 S. Ct. at 2371. "To permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit collateral attack on the conviction through the vehicle of a civil suit." Id. Therefore, Plaintiff's § 1983 claims related to the prosecution of his criminal actions have not yet arisen and must be dismissed without prejudice pursuant to Heck. Plaintiff may bring these claims after his criminal convictions have been overturned or otherwise invalidated.

To clarify, the following causes of action are dismissed without prejudice in Plaintiff's McKay Complaint pursuant to Heck: Fifteen, Twenty, Forty-five, Forty-six, Forty-seven, Forty-eight, Forty-two, and Fifty-four except as the acts in these causes of action specifically relate to his arrest.

B. Forfeiture Case

Plaintiff claims that Defendants obtained a warrant to seize property at his business, seized that property, and initiated forfeiture proceedings on that property without probable cause.
(Pl.'s Forfeiture Compl. at Attach. a-k.)

Plaintiff's claims related to the institution of the forfeiture proceedings must be dismissed. Defendants assert, and Plaintiff's does not deny,[15] that they

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[15] Plaintiff does not deny that Defendants believed they had probable cause to initiate forfeiture proceedings based upon Plaintiff's criminal convictions. Plaintiff, however, does argue that Defendants' assertion of probable cause arising from the criminal convictions was rejected by the trial court judge presiding over the forfeiture proceedings. (Pl.'s Resp. at 14.) The exhibits attached to Plaintiff's Response, however, simply show that the trial court judge denied summary judgment based upon the criminal convictions. (Id. At Exh. "E".)

determined probable cause existed to institute forfeiture proceedings based soley upon Plaintiff's criminal convictions. (Defs' Mot. Summ. J. at 5; Harris Aff. At 4-5.) Accordingly, because Plaintiff's criminal convictions were the probable cause for the forfeiture proceedings, a judgment in favor of Plaintiff finding that no probable cause existed would necessarily imply the invalidity of his criminal convictions. Accordingly, Plaintiff's § 1983 claims related to initiation of forfeiture proceedings have not yet arisen and are dismissed without prejudice pursuant to Heck. Plaintiff may bring these claims after his criminal convictions have been overturned or otherwise invalidated.

Plaintiff's claims related to seizure of the property, if proven true, however, do not necessarily imply the invalidity of his criminal convictions because of evidentiary doctrines such as independent source and inevitable discovery.[16] Heck, 114 S Ct. at 2372, n.7. Accordingly, these claims are not affected by Heck and may proceed.

To clarify, the following causes of action are dismissed without prejudice in Plaintiff's Forfeiture Complaint pursuant to Heck: First; Ninth; Eleventh; Twelfth; Thirteen; Twenty-first; and Twenty-third and Twenty-fourth except for the portion of the claims related to seizure of Plaintiff's property.[17]

The trial court judge did not rule that no probable cause existed.

[16] Moreover, it is unclear whether any of the seized property was used as evidence in Plaintiff's criminal trial.

[17] The Court also notes that Plaintiff's Third and Forth Cause of Action were dismissed from Plaintiff's Forfeiture Complaint in the Court's Order of September 30, 1996.

CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED that Plaintiff's Motion to Supplement (Doc. No. 303) is denied.

IT IS FURTHER ORDERED that Plaintiff's 42 U.S.C. § 1983 claims related to the prosecution of the Forfeiture case and the prosecution and investigation of the McKay Case are dismissed without prejudice under Heck. To clairify, the following causes of action are dismissed without prejudice in Plaintiff's McKay Complaint pursuant to Heck: Twenty, Forty-five, Forty-six, Forty-seven, Forty-eight, Fifty-two, and Fifty-four except as the acts in these causes of action specifically relate to plaintiff's arrest. The following causes of action are dismissed without prejudice in Plaintiff's Forfeiture Complaint pursuant to Heck: First; Ninth; Eleventh; Twelfth; Thirteen; Twenty-first; and Twenty-third and Twenty-forth except as the acts in these causes of action specifically relate to seizure of Plaintiff's property. Plaintiff may refile these dismissed claims once his criminal convictions have been overturned or otherwise invalidated.

DATED this 18 day of January, 1997.

S/D_____
ROSLYN O. SILVER
United States District Judge

FILED COPY
APRIL 29, 1997
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	
	)	
Anant Kumar Tripati,	)	
Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al.,	)	
Defendants,	)	
	)	

No. CIV 94-0170-PHX-ROS (BGS)
No. CIV 94-504-PHX-ROS(BGS)
No. CIV 95-702-PHX-ROS (BGS)
(Consolidated)

Pending before the Court is Defendants' Motion for Reconsideration (Doc. 293)

Motions for reconsideration should be granted only where (1) 18 the Court "has patently misunderstood a party;" (2) the Court "has made a decision outside the adversarial issues presented to the Court;" (3) the Court has "made an error not of

reasoning, but of apprehension;" or (4) there is a "controlling or significant change 22 in the law or facts since the 'submission of the issue to the Court." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 2411 F.R.D. 99 (E.D.Va. 1983).

In the Motion, Defendants argue that Plaintiff's Affidavit detailing his conversations with Teresa Archuleta. cannot be used to create an issue of fact to deny the Motion for Summary Judgment„------, .because those conversations are hearsay and thus inadmissible evidence. In response, Plaintiff argues that his conversations with Teresa Archuleta are admissible under either Rule 801(d) (2) or Rule 804(b) (3), Federal Rules of Evidence.

Although it appears that Plaintiff's conversations with Teresa Archuleta are admissible[18],

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[18] The conversations are admissible against the Estate of Teresa Archuleta pursuant to Rule 801(d)(2) (A.), Federal Rules of Evidence, as an admission of a party opponent. Bee, e.g., Estate of Schafer v. Commissioner, 749 F.2d 1216, 1220 (9th Cir. 1984) (statement by decedent .admissible against estate).

The conversations also appear to be admissible against the other Defendants pursuant to Rule 801(d) (2) (D) as a statement by a servant concerning a matter within the scope of employment and made during the existence of the relationship. Defendants' principal objection to admission under this Rule is that Plaintiff has failed to show that Teresa Archuleta was authorized to make the statements. The cases cited by Defendants in support of this proposition, however, interpret an earlier version of the Rule. Authority to make the statement is no longer required. See ; 23

the Court does not need to reach that issue. "If a party fails to move to strike an affidavit that is allegedly defective under Rule 56(e), he waives an objection to Allen v. Scribner, 812 F.2d 426, 435 n.18 (9th Cir. 1987)

Here, Defendants failed to file a Motion to Strike Plaintiff's Affidavit. In fact, Defendants failed to object in any' manner to Summary Judgment.

Defendants Motion for Reconsideration will be denied. Plaintiff's Motion to Strike Defendant's motion for Reconsideration and Strike Portions of the Reply to Response to Motion for Reconsideration (Doc. No. 308) will be denied as moot.

IT IS **THEREFORE ORDERED** that Defendants' Motion for Reconsideration (Doc. No. 293) is denied.

Nekolny v. Painter, 653 F.2d 1164, 1171 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Because, however, no party briefed the' issue of whether Teresa Archuleta's statements concerned a matter within the scope of her employment, the Court cannot decide the issue of admissibility against the other Defendants. See In re Aircrash in Bali, Indonesia, 871 F.2d 812, 816 (9th Cir.), cert. denied, 493 U.S. 917 (1989); Breneman v. Kennecott Corn., 799 F.2d 470, 473 (9th Cir.27 1986).

IT IS **FURTHER ORDERED** that Plaintiff's Motion to Strike Defendants' Motion for Reconsideration (Doc. No. 295) and Motion to Strike Portions of Reply to Response to Motion for Reconsideration (Doc No. 308) are denied as moot.

DATED this 21 day of April, 1997

S/D

ROSYLN O SLIVER
US District Court Judge

Copies to all counsel of record

FILED COPY
September 16, 1997
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-
)		ROS
Anant Kumar Tripati,	)	
Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al.,	)	
Defendants,	)	
	)	

Plaintiff has filed a pleading styled, "Motion Under Local Rule 1.10(p) Re: Document 168 Due to Change in Facts." The Court construes this as a Motion for Reconsideration.

FACTUAL BACKGROUND

On March 30, 1995, this Court ruled that, under Younger v. Harris, 401 U.S 37 (1971), it would abstain from considering various claims raised in Plaintiff's complaint to the extent that those claims raised issues being considered by the Arizona state courts. (See Order dated March 24, 1995; Doc. 168.) Accordingly, the Court dismissed those claims without prejudice. See Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353, 1258 (9th Cir. 1986) (if

Younger applies, action must be dismissed.) Since that decision, however, appeals have been exhausted, and his conviction was upheld. Thus, there are no longer state court proceedings pending in the Arizona state courts which address the issues raised in the claims previously dismissed by this Court.

After Plaintiff's state court conviction was upheld, this Court directed the parties to submit briefs regarding the impact of Heck v. Humphrey, 512 U.S. 477 (1994), on Plaintiff's remaining claims. The Court considered the supplemental briefs, and by Order dated January 18, 1997, dismissed, without prejudice the following claims from Plaintiff's Second Amended Complaint:[19] Counts Twenty; Forty-five; Forty-six; Forty-seven; Forty-eight; Fifty-two and Fifty-four, except insofar as the acts alleged in these causes of action specifically relate to Plaintiff's arrest. The Court Ordered that Plaintiff "may refile these dismissed claims once his criminal convictions have been overturned or otherwise invalidated." (Order dated January 18, 1997 at 8:7-8.) In addition, the Court noted in footnote 2 of that Order that this Court had dismissed numerous claims from the McKay Complaint on March 30, 1995, and specifically set forth by number the claims that had been dismissed.

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[19] The Second Amended Complaint referred to is the "McKay Complaint," which refers to the cause of action originally filed as CIV-94-170. The "McKay Complaint" was subsequently consolidated with two other cases, CIV-94-504 (the "Forfeiture Case") and CIV95-702 (the "Insurance Case"), but at the time the March 30, 1995 Order, which Plaintiff seeks this Court to reconsider, was filed, the cases had not yet been consolidated. Thus, Plaintiff's motion addresses only those claims raised in the "McKay Complaint."

Separately, and before deciding the impact of *Heck* on Plaintiff's claims, Magistrate Judge Silverman denied Plaintiff's request to reopen discovery without prejudice, subject to renewal after the undersigned judge resolved the Heck issue. (Doc. 311.)

Plaintiff subsequently filed the instant Motion for Reconsideration, (Doc. 313), as well as a separate renewed Motion to Reopen Discovery. (Doc. 312.)[20] In his Motion for Reconsideration, Plaintiff asks the Court to reconsider its decision of March 30, 1995, to dismiss the claims referenced at footnote 2 of this Court's Order dated January 18, 1997. Plaintiff argues that the interests of the parties and judicial economy would best be served by "setting aside" the abstention order. Essentially, the relief Plaintiff asks this Court to grant him is that he be permitted to amend his complaint to. state claims that were previously dismissed pursuant to Younger. Plaintiff's renewed request to reopen discovery is thus premised on the possibility that the Court will permit him to amend his complaint to re-state the dismissed claims.

LEGAL DISCUSSION

A. LEAVE TO AMEND

Fed. R. Civ. P. 15(a) governs the amendment of pleadings. The rule states that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Supreme Court has held that although the decision whether to grant leave to amend is within the sound discretion of the trial court, leave to amend should be freely given. Foman v. Davis, 371 U.S. 178, 182 (1962). In Richardson v. United States, 841 F.2d 993, 999 (9th

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Cir. 1988), the Ninth Circuit stated that leave to amend should be freely given unless there is "an affirmative showing of either prejudice or bad faith." The four factors to be considered in deciding whether to grant leave to amend are undue delay, bad faith, prejudice and futility of amendment. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).

The Court is most concerned with the question whether amendment would be futile because, if Plaintiff's claims are subject to dismissal pursuant to Heck, it would be futile to permit him leave to amend to state those claims. Accordingly, the Court will first address whether Plaintiff's claims survive Heck.

B. HECK V. HUMPHREY

1. Plaintiff's proposed amendments

In footnote 2 of its Order dated January 18, 1997, the Court dismissed the following claims, which Plaintiff now seeks leave to re-file in this action.

In Count Four, Plaintiff alleges that Defendants lied to California and Arizona state officials in order to obtain a warrant to arrest him in California and extradite him to Arizona. (Doc. 82.)

In Counts Five, Six, Seven, Eight Nine, Ten, Eleven and Twelve, Plaintiff alleges that he was denied his protected liberty interest, created by mandatory language in the Arizona Rules of Criminal Procedure. (Id.)

In Counts Thirteen and Fourteen, Plaintiff alleges that Defendants seized his property in violation of the Fourth and Fourteenth Amendments and California law. In Count Seventeen, Plaintiff alleges a violation of the UCEA. (Id.).

In Counts Eighteen, Nineteen, Twenty, Twenty-one, and Twenty-two, Plaintiff alleges that his state

created liberty interests were violated when Defendants lied to the grand jury and petit jury regarding statements allegedly made by him. (Id.)

In Counts Twenty-three, Twenty-four, Twenty-five, and Twenty-six, Plaintiff alleges that Defendants violated his state created liberty interests by lying, presumably during trial testimony. (1d.)

In Counts Twenty-seven and Twenty-eight Plaintiff alleges that Defendant Maricopa County violated his right to due process when denying him the right to (1) call witnesses, and (2) use a computer, real estate expert and handwriting expert because he was indigent. (IA.)

In Count Twenty-nine, Plaintiff alleges that he was denied the opportunity to be heard on his unlawful search and seizure claims. (Id.)

In Count Thirty, Plaintiff alleges that his due process rights and Sixth. Amendment right to confront witnesses were violated when Defendant Maricopa County offered inadmissible hearsay to prove essential elements of the crimes charged. (Id.)

In Count Thirty-one, Plaintiff alleges that Defendant Maricopa County, acting pursuant to a municipal custom, failed to follow its own rules regarding arrests, speedy trials, counsel and search and seizure in prosecuting his trial, thus violating his state created liberty interest. In Count Thirty-two, Plaintiff alleges that Defendant Maricopa County violated state law, in violation of his state created liberty interests, when sentencing him to an aggravated sentence. ((Id.)

In Counts Thirty-three, Thirty-four, Thirty-five, Thirty-six, Thirty-seven Plaintiff alleges that Defendant Maricopa County violated his Fourth, Sixth

and Fourteenth Amendment rights by (1) denying him access to transcripts to assist him in preparing his motion for new trial, (2) refusing to allow him to present mitigating evidence at sentencing, (3) denying him effective assistance of counsel because of his indigence, (4) suppressing material false evidence, and (5) threatening him that his sentence would be enhanced, despite their knowledge that there was no basis for the enhancement, to force him to plead guilty. (Id.)

In Counts Thirty-eight, Thirty-nine and Forty Plaintiff alleges that Defendants Maricopa County and Maricopa County Attorney failed to (1) promulgate appropriate procedures for use by its agents, which procedures, if followed, would have prevented the deprivations of his constitutional rights alleged, (2) train its agents to prevent the alleged constitutional violations, and (3) supervise its agents to prevent the alleged constitutional
violations. (Id.)

In Counts Forty One, Forty-two, Forty-three, and Forty-four Plaintiff alleges state law claims for injury to his business reputation, intentional infliction of emotional distress, and legal malpractice. (Id.)

In Count Forty-six, Forty-seven, and Forty-eight Plaintiff alleges that Defendants violated 42 U.S.C. 1985(3) by conspiracy to deprive him of equal protection of the laws because he had challenged their unconstitutional practices. (Id.)

In Count Forty-nine, Plaintiff alleges that Defendants seized his business in violation of his Fourth and Fourteenth Amendments and the laws of California. (Id.)

Finally, in Count Fifty-three, Plaintiff alleges

that Defendants violated his rights guaranteed by Article II of the Arizona Constitution. (Id.)

2. Futility of amendment

Plaintiff's proposed amended claims can be grouped into three categories: (1) § 1983 claims; (2) § 1985(3) conspiracy claims; and (3) supplemental state law claims.

a. Section 1983 claims

Under Heck, "(w]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."Heck, 512 U.S. at 487. If the plaintiff's § 1983 claim would imply the invalidity of his conviction or sentence, the claim does not arise until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus. Id. at 489. Plaintiff's proposed additional section 1983 claims would all be subject to dismissal pursuant to Heck if the court granted him leave to amend his complaint to add these claims. Hence, Plaintiff will be denied leave to amend his complaint to add the following claims: Counts Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty, Thirty-one, Thirty-two, Thirty-three, Thirty-four, Thirty-five Thirty-six, Thirty-seven, Thirty-eight, and Forty-nine.

b. Section 1985(3) claims

In Counts Forty-six, Forty-seven, Forty-eight, Plaintiff alleges that Defendants conspired to deprive

him of his constitutional rights because he is Indian, in violation of 42 U.S.C. § 1983(5). Although the \Supreme Court's opinion in Heck specifically addressed only the viability of a § 1983 claim for damages, the same principles apply to the visibility of a § 1983(5). Although the Supreme Court's opinion in Heck specifically addressed only the viability of a § 1993 claim for damages, the same principles apply to the viability of a § 1985(3) claim for damages. See Duamutef v. Morris, 956 F. Supp. 1112, 1117 (S.D.N.Y. 1997) (plaintiff's § 1985(3) claim would necessarily call into question the validity of his criminal prosecution); Horton v.Marovich, 925 F. Supp. 532, 437 (N.D. Il. 1996); see also, Venegas v. Wagner, 704 F.2d 1144 (9th Cir. 1983) (holding that, for statue of limitations purposes, plaintiff's § 1985(3) conspiracy claim did not accrue until reversal of his conviction). To allow Plaintiff to proceed on his damages claim for conspiracy to violate his constitutional rights, when Heck bars his claim for damages for violation of his constitutional rights, would be inconsistent with Heck's rationale because it would allow a plaintiff to pursue a civil rights damages claim for a violation of constitutional rights when, without the allegation of conspiracy, no damages claim is available for the alleged violation. Hence, Plaintiff will be denied leave to amend to state his 1985(3) claims alleged in Counts Forty-six, Forty-seven and Forty-eight.

c. Supplemental state law claims

In Counts Forty-one, Forty-two, Forty-three, and Forty-four, Plaintiff alleges state law claims for injury to his business reputation, intentional infliction of emotional distress and legal malpractice. In Count Fifty-three, Plaintiff alleges that his rights under the Arizona

Constitution were denied. Because Heck does not apply to state law claims, the Court will not deny Plaintiff leave to state these claims on the ground that to do so would be futile. However, in deciding whether to retain
supplemental jurisdiction over these claims, the Court has considered whether it retains original jurisdiction over Plaintiff's complaint. Specifically, the Court is concerned that none of Plaintiff's claims survive Heck.

3. Continuing viability of claims remaining

After the Court's March 30, 1995 Order, the following claims remained in the "McKay Complaint": Counts One, Two, Three, Fifteen, Sixteen, Twenty, Forty-five, Fifty, Fifty-one and Fifty-two. In its Order dated January 18, 997, the Court dismissed Counts Fifteen, Twenty, Forty-five, Forty-six, Forty-eight, Fifty-two and Fifty-four, leaving only Counts One, Two, Three, Sixteen, Fifty and Fifty-one.

In addition, the following claims remained in the "Forfeiture Complaint":[21] Counts Two, Three, Four, Five, Six, Seven, Eight, Ten, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-two, Twenty-five, Twenty-six and Twenty-seven. (Doc. 201.)

On reconsideration of those claims, the Court has determined that Plaintiff has failed to establish that his S 1983 claims for damages based on the acts alleged in those counts are not barred by Heck.

a. McKay Complaint

In Counts One, Two and Three, Plaintiff

---

[21] The Insurance Case was dismissed in its entirety on September 30, 1996.

alleges that his arrest was unlawful, both in violation of the United States Constitution and the Arizona Constitution. In Count Sixteen, Plaintiff alleges that Defendant Maricopa County denied his Fourth and Fourteenth Amendment rights by providing a financial incentive to Bondco to issue a bond for Plaintiff, even though it knew that Bondco lacked authority to issue bonds in Arizona. (Second Am. Compl. at A-D.) In Count Fifty, Plaintiff alleges that Defendants arrested him only to cause injury to his business. Finally, in County Fifty-one, Plaintiff alleges that Defendants violated A.R.S. § 11-532, which sets forth the powers and responsibilities of the county attorney. Hence, in Count Fifty-one, Plaintiff is apparently claiming that the county attorney failed to perform his duties when prosecuting Plaintiff.[22]

Although this Court earlier determined that success on these claims would not necessarily imply the invalidity of Plaintiff's conviction, Plaintiff has neither alleged nor provided support for a finding that the state trial court or appellate court found that Plaintiff did suffer a constitutional violation, though the violation did not invalidate the conviction. The state court may have found, for example, that the violation was harmless error or that evidence seized in an unlawful seizure was admissible because of the doctrine of inevitable discovery. See Heck, 512 U.S. at 487 n.7. Hence, the Court has determined that Plaintiff has failed to meet his burden of establishing that success on these claims would not imply the invalidity of his conviction, and,his complaint must be dismissed,

[22] Insofar as plaintiff is attempting to assert a state law claim based on violation of this statue, this claim would be a supplemental state law claim.

without prejudice.[23]

However, the Court will grant Plaintiff leave to amend his complaint to allege facts which show that a state court did find that he suffered a constitutional violation, though the violation did not require reversal or invalidation of his conviction. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (pm se litigant must be granted leave to amend her complaint unless the amendment would be futile) .Plaintiff will be permitted an opportunity to cure this defect with respect to all the § 1983 and § 1985(3) claims

4 Insofar as Plaintiff is attempting to assert a state law claim based on violation of this statute, this claim would be a supplemental state law claims raised in his Second Amended "McKay" Complaint. Plaintiff may assist the Court by stating, in his amended complaint, specific facts establishing that a state court found a constitutional violation with respect to each act alleged to be a violation of his constitutional rights. If Plaintiff fails to state specific facts showing that each individual claim raised may proceed, each claim so deficient will be dismissed.

Because the Court has resolved that all federal claims alleged in the McKay Complaint must be dismissed, it must determine whether to retain jurisdiction over the supplemental state law claims. *28 U.S.C. § 1367.* Although the Court would retain jurisdiction over these claims were the federal claims to go forward, the Court has resolved that the better course is to 'decline to exercise supplemental

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[23] Because the Court finds that Plaintiff's federal claims must be dismissed, it declines to continue to exercise jurisdiction over Plaintiff's supplemental state law claims. 28 U. S. C. § 1367.

jurisdiction after determining that those federal claims must be dismissed. The Court will reconsider this decision if Plaintiff can allege facts permitting his federal claims to go forward.

Hence, if Plaintiff files an amended complaint, he may include the supplemental state law claims. If the court finds that the federal claims survive, it will retain jurisdiction over the supplemental state law claims raised in Counts Forty-one, Forty-two, Forty-three, Forty-four and Fifty-three of the McKay Complaint.

b. Forfeiture Complaint .

With respect to the claims remaining in the Forfeiture Complaint, the Court is concerned that Plaintiff has failed to allege facts which show that the allegations of constitutional violations alleged in his claims for damages were resolved in his favor by the state trial or appellate court. In other words, Plaintiff has not established that the constitutional violations alleged in the Forfeiture Complaint survive his conviction. Hence, the Court will grant Plaintiff an opportunity to establish that the conviction in his criminal case does not preclude his claims for damages.

Accordingly,

IT IS ORDERED granting in part and denying in part Plaintiff's Motion for Reconsideration due to change in facts (Doc. 313-1). Plaintiff's complaint is dismissed in its entirety, without prejudice. Plaintiff shall have sixty (60) days in.which to file an amended complaint, curing the deficiencies stated in this Order with respect to the allegations contained in the Second Amended Complaint filed in CIV-94-170-PHX-ROS at Doc. 82. Plaintiff is warned that failure to comply with the terms of this Order may result in dismissal of this

action without further notice. Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992), cert. denied, 506 U.S. 915 (1992).

FURTHER ORDERED denying as moot Plaintiff's Motion to Reopen Discovery (Doc. 312-1).

FURTHER ORDERED that Plaintiff shall file a supplemental memorandum, establishing that his claims for damages arising from the civil forfeiture are not barred by Heck no later than sixty (60) days from the date of this Order. If Plaintiff fails to establish that his claims survive, the Court will consider at that time whether to dismiss the Forfeiture Complaint in its entirety.

FURTHER ORDERED withdrawing the reference from the Magistrate Judge for the purpose of determining whether Plaintiff's complaints survive Heck. If the Court determines that any of Plaintiff's claims may proceed, it will refer the matter back to the Magistrate Judge to prepare for trial.

DATED this 2nd day of September, 1997.

S/D

ROSYLN O SILVER
US District Court Judge

copies to all counsel of record

FILED COPY
DECEMBER 4, 2001
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

Anant Kumar Tripati, Plaintiff, vs. Gunn McKay, et al., Defendants,	No. CIV 94-0170- PHX-ROS **ORDER**

A. Background.

Before the Court for screening is Plaintiff's [Fourth] Amended Complaint (Doc. No. 321), based on diversity jurisdiction and 42 U.S.C. § 1983. Earlier complaints are: (1) the original Complaint filed in the Central District of California on May 13, 1993 (Doc. No. 1); (2) the First Amended Complaint filed in the Central District of California on May 27, 1993 (Doc. No. 4); (3) the Second Amended Complaint (the "McKay Complaint") filed on March 8, 1994 after the California lawsuit was transferred to this Court (Doc. No. 82); and (4) the Third Amended Complaint (the "Forfeiture Complaint") filed on July 18, 1995, alleging claims

formerly brought in CIV-94-0504-PHX-ROS, which was consolidated with this case
(Doc. No. 201).

B. Statutory Screening of Prisoner Complaints.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. *28 U.S.C. § 1915A(a).* The Court must dismiss a complaint or portion thereof if the Plaintiff has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such 4 relief. *28 U.S.C. § 1915A(b)(1),(2).* The Court also must dismiss a complaint or portion thereof if Plaintiff fails to exhaust any administrative remedy available to him. *42 U.S.C. § 1997e(a).*

C. Fourth Amended Complaint.

The Fourth Amended Complaint generally alleges improprieties involving Plaintiff's arrest and seizure of his property. However, the Court is unable to determine the precise number and nature of Plaintiff's claims. Named as Defendants are: Gunn McKay; Dean Chatfield; Terry Blake; Donald E. Conrad; Richard Mesh; Richard M. Romley; Ronald
Harris; Vincent Tolino; Gerald Grant; Estate of Teresa Archuleta; Estate of Ed King; Jessica Funkhouser, Betsey Bayless; Tom Rawles; Don Stapley; Mary Rose Wilcox; and Maricopa County. Plaintiff seeks monetary damages.

D. Failure to Make Short, Plain Statement of Claims.

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain

statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) of the Federal Rules of Civil Procedure states that "[e]ach averment of a pleading shall be simple, concise, and direct." A complaint having the factual elements of a cause of action present but scattered throughout the Complaint and not organized into a "short and
21 plain statement of the claim" may be dismissed for failure to satisfy Rule 8(a) of the Federal Rules of Civil Procedure. Spading v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988); McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996).

In order to assist litigants to understand the Rule 8 requirement that averments "be simple, concise, and direct," Rule 84 of the Federal Rules of Civil Procedure provides for an Appendix of Forms, "intended to indicate the simplicity and brevity of statement which the rules contemplate." McHenry, 84 F.3d at 1177. The Ninth Circuit, demonstrating
the type of allegation which makes a short plain statement of a § 1983 claim, quoted Form 9 (Complaint for Negligence) of that Appendix:

> 1. Allegation of jurisdiction.
>
> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
>
> 3. As a result plaintiff was thrown down and had his leg broken, and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand

dollars.

Id.

The court went on to say:

> This complaint fully sets forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery. It can be read in seconds and answered in minutes.

Id.

Plaintiff's Fourth Amended Complaint fails to provide "a short and plain statement of the claim." Fed.R.Civ.P.8(a). Plaintiffs various statements of his 43 claims incorporate 38 paragraphs of facts, fail to identify the specific Defendants against whom each claim is alleged, in many cases are duplicative of other claims, and fail to differentiate between factual allegations and allegations of injury,

Because Plaintiff has failed to identify the specific Defendants in relation to each of his claims, it would be, as a practical matter, impossible for the Defendants to draft an answer to the Fourth Amended Complaint in its present form. Therefore, the Fourth Amended Complaint will be dismissed with leave to amend to allow Plaintiff to clearly allege his claims in short, plain statements which demonstrate he is entitled to relief. In the Fifth Amended Complaint, Plaintiff must tell the Court: (1) the constitutional rights Plaintiff 23 believes were violated; (2) the name of the Defendant(s) who violated the right; (3) exactly what the Defendant(s) did or failed to do; (4) how the

action or inaction of the Defendant is connected to the violation of Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of the Defendant's conduct. Rizzo v. Goode, 423 U.S. 362, 371- 72, 377 (1976). Plaintiff must repeat this process for each person he names as a Defendant in connection with a constitutional claim. If Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific injury suffered by Plaintiff, the allegation against that Defendant will be dismissed for failure to state a claim.

With respect to the claims he alleges under diversity jurisdiction, Plaintiff must clearly state: (1) the legal right or privilege Plaintiff believes was violated and that entitles him to relief; (2) the name of the Defendant(s) who violated the right or privilege; (3) exactly what the Defendant(s) did or failed to do; (4) how the action or inaction of the Defendant(s) is connected to the violation of Plaintiff's right or privileges under the law; and (5) what specific injury Plaintiff suffered because of the Defendant's conduct. See Rule 8(a),(e), FED.R.CIV.P.

Further, the Court notes that Plaintiff indiscriminately mixes his references to constitutional, statutory, common, Arizona state and California state law. In each count he alleges in the Fifth Amended Complaint, Plaintiff must specifically state the authority under which he brings that claim. Failure to do so will result in the dismissal of that claim.

In drafting his Fifth Amended Complaint, Plaintiff should pay special attention to the statement of claim set out in the Appendix of Forms, cited with approval by the Ninth Circuit Court of Appeals in

McHenry, and provided to Plaintiff; above, in this Order.

E. Compliance With Local Rule 3.1(a): Only One Claim Per Count.

Further, Plaintiff must comply with Local Rule 3.1(a) of the Local Rules of Practice for the United States District Court for the District of Arizona. Local Rule 3.1(a) requires that all complaints by prisoners be in accordance with the instructions provided in the court-approved civil rights complaint form. Specifically, the instructions provide that Plaintiff "MAY ALLEGE THE VIOLATION OF ONLY ONE CIVIL RIGHTS CLAIM PER COUNT." See Information and Instructions for a Prisoner Filing Civil Rights Complaint in the United States District Court for the District of Arizona Form, at 4 (emphasis in original); see also, Complaint form at 4, 5 and 6 ("if your claim involves more than one issue, each issue should be stated in a different count"). Accordingly, in any Fifth Amended Complaint, Plaintiff may allege only one claim per count. If Plaintiff alleges more than three counts (the form provides space to allege three separate counts), Plaintiff must provide the necessary information about each additional count on separate pages.

F. Failure to State a Claim.

Although the dismissal of the Fourth Amended Complaint with leave to amend is based on Rule 8 and Plaintiff's failure to make a short, plain statement of his 43 claims, the Court will further screen the Fourth Amended Complaint to ensure that Plaintiff is allowed the opportunity to cure the deficiencies of his claims. However, the Fifth Amended Complaint will be Plaintiff's find opportunity to amend.

The Court will assign a number to each count of the Fourth Amended Complaint based on Plaintiffs designation of those claims. In the future, the parties will be required to refer to those claims based on the numbering system used in this Order.

1. Count One

In Count One, Plaintiff claims that unidentified Defendants seized his property in violation of the Fourth Amendment. Because Plaintiff fails to identify the individual Defendants who violated his constitutional rights, the claim must be dismissed with leave to amend. See Rizzo, supra.

2. Count Two

In Count Two, Plaintiff alleges that unidentified Defendants seized his property in violation of the Arizona and California constitutions. Again, because Plaintiff fails to identify the individual Defendants who violated his constitutional rights, the claim must be dismissed with leave to amend under Rizzo.

3. Count Three

In Count Three, Plaintiff alleges that unidentified Defendants entered his office and seized his property, thereby committing torts of wrongful seizure and invasion of privacy. Again, Plaintiff fails to identify the individual Defendants who allegedly committed these torts. Further, a federal court applies substantive state law in a diversity action. Plaintiff has failed to allege whether these claims are brought under Arizona or California state law. Accordingly, this claim must be dismissed with leave to amend.

4. Count Four

In Count Four, Plaintiff alleges that unidentified Defendants manufactured probable cause for the search and seizure of Plaintiff's office and personal

property in violation of the Fourth and Fourteenth Amendments. This claim is redundant because Plaintiff has already alleged lack of probable cause for the search and seizure in Count One. Accordingly, this Count will be dismissed and may not be realleged in the Fifth Amended Complaint.

5. Count Five

In Count Five, Plaintiff alleges that unidentified Defendants "abused process" because their purpose in seizing the records was to destroy them. Again, Plaintiff has failed to identify the individual Defendants who allegedly injured him and has failed to allege whether this claim arises under federal, Arizona or California law. Accordingly, this Count will be dismissed with leave to amend.

6. Count Six

In Count Six, Plaintiff alleges that unidentified Defendants falsely arrested his property, negligently falsely imprisoned his property, and were recklessly incompetent in their investigation. This Count is duplicative of Count Three in which Plaintiff alleges the tortuous seizure of his property. His allegation that Defendants were reckless in their investigation is duplicative of Plaintiff's "lack of probable cause" claim raised in Count One. Accordingly, this Count will be dismissed and may not be realleged in the Fifth Amended Complaint.

7. Count Seven

In Count Seven, Plaintiff alleges that unidentified Defendants took custody of his property in violation of the Fourth and Fourteenth Amendments. This Count is duplicative of Count One. Accordingly, this Count will be dismissed and may not be realleged in the Fifth Amended Complaint.

8. **Count Eight**

In Count Eight, Plaintiff alleges that the seizure of his property by unidentified Defendants violated the California constitution. This Count is duplicative of Count Two. Accordingly, this Count will be dismissed and may not be realleged in the Fifth Amended Complaint.

9. **Count Nine**

In Count Nine, Plaintiff alleges that unidentified Defendants committed tortious theft 8 under California state law when they seized his property. Because Plaintiff fails to identify the individual Defendants who allegedly committed the tort, this Count will be dismissed with leave to amend.

10. **Count Ten**

In Count Ten, Plaintiff alleges that unidentified Defendants impaired or interfered with the goodwill associated with his former business when they seized computer software necessary to the function of the business. Plaintiff fails to identify the individual Defendants who allegedly committed this act and fails to allege whether this claim arises under federal, Arizona or California law. Accordingly, this Count will be dismissed with leave to amend.

11. **Count Eleven**.

In Count Eleven, Plaintiff realleges that the seizure of his property constituted theft. This Count is duplicative of Count Nine. Accordingly, this Count will be dismissed and may not be realleged in the Fifth Amended Complaint.

12. **Count Twelve**

In Count Twelve, Plaintiff alleges that the seizure of his property without compensation by unidentified Defendants violates the Fourth and

Fourteenth Amendments. Plaintiff fails to identify the individual Defendants who allegedly committed this act. Further, it appears that this claim arises under the Fifth Amendment rather than the Fourth or Fourteenth. Accordingly, this Count will be dismissed with leave to amend.

13. Count Thirteen

In Count Thirteen, Plaintiff alleges that Dean Chatfield unlawfully arrested him and searched his office in California. The unlawful search claim is duplicative of Count One. Accordingly, it will be dismissed and may not be realleged as a separate count in the Fifth Amended Complaint.

Plaintiffs claim that he was unlawfully arrested is barred by the holding in Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff's interpretation of Arizona's procedural rules notwithstanding[24], the Ninth Circuit has held where a civil rights complainant alleges that police officers lacked probable cause to arrest him and conspired to
bring unfounded criminal charges against him, the Court must apply the holding of Heck, which bars a § 1983 action where judgment in a plaintiff's favor would imply the invalidity of the sentence or conviction. Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996). Therefore, any claims regarding lack of probable cause

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[24] The Court notes that a number of exceptions to procedural bar exist in both state and federal context. Because the court cannot be certain that one of these exceptions will not be applied in Plaintiff's case in the future, the Court must consider the possibility that judgment to this claim in Plaintiff's favor would necessarily imply the invalidity of Plaintiff's convictions.

for arrest and a conspiracy to bring unfounded criminal charges against Plaintiff (b
which are alleged in the Fourth Amended Complaint) may only be reviewed by this Court if Plaintiff can demonstrate that his conviction or sentence "has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Heck, 512 U.S. at 486. Plaintiff has not done so. Accordingly, this claim must be dismissed.

14. Count Fourteen

In Count Fourteen, Plaintiff alleges that his extradition from California to Arizona was improper under the Uniform Criminal Extradition Act. A claim alleging violation of the federal extradition statute, *18 U.S.C. § 3182*, by local law enforcement agents states a cause of action under § 1983. Draper v. Coombs. 792 F. 2d 915, 920 (9th Cir. 1986).[25] The Court notes that a number of exceptions to procedural bar exist in both state and federal contexts. Because the Court cannot be certain that one of these exceptions will not by applied in Plaintiffs case in the future, the Court must consider the possibility that judgment on this claim in Plaintiffs favor would necessarily imply the invalidity of Plaintiffs convictions of action under § 1983, Draper v.

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[25] However, Plaintiff should note that if he was returned to the demanding state and there convicted of the charges against him, he suffers no actual injury, and may sue for nominal damages only. Id. Nominal damages in the Ninth Circuit are $1.00. See Floyd v Laws, 929 F. 2d 1390, 1401 (9th Cir. 1991); see also, Wiggins v. Rushen, 760 F.2d 1009, 1012 (9th Cir. 1985) (award of nominal damages may not exceed $1.00).

Coombs, 792 F.2d 915, 920 (9th Cir. 1986).2 However, Plaintiff must identify the individual Defendants who allegedly acted in violation of the statute and explain how their actions violated the statute. Accordingly, Count Fourteen will be dismissed with leave to amend.

15. Count Fifteen

In Count Fifteen, Plaintiff alleges further improprieties regarding his extradition. These claims should be alleged in Count Fourteen of the Fourth Amended Complaint and may not be alleged in a separate count in the Fifth Amended Complaint.

16. Count Sixteen

In Count Sixteen, Plaintiff alleges that he was detained for 115 days without receiving a judicial determination on the issue of probable cause. See Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (holding that Fourth Amendment requires judicial determination of probable cause as prerequisite to detention). Plaintiff fails to name any Defendant in connection with this claim. Accordingly, Count Sixteen will be dismissed with leave to amend to allow Plaintiff to identify the Defendants whose conduct caused his injury.

17. Count Seventeen

In Count Seventeen, Plaintiff again challenges the propriety of the search and seizure of his property, claiming that unidentified Defendants' conduct was motivated by racial discrimination. It appears Plaintiff is alleging a violation of Equal Protection. Therefore, in his Fifth Amended Complaint, Plaintiff must identify the Defendants who violated his rights, the suspect class to which he belongs, and the fundamental right violated by Defendants' conduct. If Plaintiff is unable to identify a fundamental right, he must allege, if he can

do so in good faith, that the conduct of Defendants at issue is not rationally related to a legitimate government interest.

18. **Count Eighteen**

In Count Eighteen, Plaintiff claims that he was arrested and prosecuted because he is an East Indian, a racial minority. To find the Plaintiff was arrested and prosecuted solely on the basis of his race would necessarily imply the invalidity of his conviction. Accordingly, this claim is barred by ads unless Plaintiff can show that his conviction has been invalidated. Because Plaintiff has failed to do so, this claim must be dismissed.

19. **Count Nineteen**

In Count Nineteen, Plaintiff claims that Defendants Grant, Romley, McKay and Conrad gave other unnamed Defendants some unspecified "incorrect legal advice," in violation of the Fourth and Fourteenth Amendments. Plaintiff fails to affirmatively link the conduct of Defendants to a specific constitutional injury. Accordingly, Count Nineteen will be dismissed with leave to amend.

20. **Count Twenty**

In fact, there is no Count Twenty. Plaintiff appears to skip from Count Nineteen to Count Twenty-One. For purposes of continuity, the Court notes that there is no Count Twenty and Count Twenty may not appear in the Fifth Amended Complaint.

21. **Count Twenty-One**

In Count Twenty-One, Plaintiff alleges that unidentified Defendants intentionally interfered with his prospective business relationships. Plaintiff fails to identify the specific Defendants whose conduct he alleges caused his injury and fails to allege whether his

claim arises under federal, Arizona or California law. Accordingly, Count Twenty-One will be dismissed with leave to amend.

22. Count Twenty-Two

In Count Twenty-Two, Plaintiff claims that unidentified Defendants failed to promulgate appropriate rules and regulations, causing unspecified injuries to Plaintiff. Plaintiff fails to identify the rules and regulations, the Defendants and the injuries to which he refers. Further, Plaintiff fails to demonstrate the affirmative link between the failure to promulgate certain rules and the specific injury he suffered as a result. Accordingly, Count Twenty-Two will be dismissed with leave to amend.

23. Count Twenty-Three

In Count Twenty-Three, Plaintiff alleges that unidentified Defendants agreed to provide him certain documents but failed to do so. Plaintiff claims that Defendants' conduct resulted in a denial of access to the courts, a denial of due process, fraud, and breach of contract. To establish that he was denied meaningful access to the courts, a plaintiff must submit evidence showing that he suffered an "actual injury" as a result of the Defendants' actions. See Lewis v. Casey, 518 U.S. 343 (1996) (holding that an inmate bringing an access to the courts claim must establish that he has suffered an "actual injury"). Plaintiff has failed to allege an actual injury. Further, Plaintiff fails to identify the Defendants whose conduct caused his injury. In addition, Plaintiff fails to allege any of the elements of breach of contract or fraud and to explain whether these claims arise under federal, Arizona or California law, Accordingly, Count Twenty-Three will be dismissed with leave to amend.

24. **Count Twenty-Four**

In Count Twenty-Four, Plaintiff claims that unidentified Defendants in their official capacity violated his rights and the "rights" of his property. Plaintiff fails to identify the individual Defendants who caused his alleged injury, the nature of the "special relationship" he claims existed between him and Defendants and the nature of the alleged injuri s. 22 Accordingly, Count Twenty-Four will be dismissed with leave to amend.

25. **Count Twenty-Five**

In Count Twenty-Five, Plaintiff claims that unidentified Defendants failed to enforce unidentified rules and regulations, causing unspecified injuries. Count Twenty-Five will be dismissed with leave to amend to allow Plaintiff to identify the Defendants, the rules they failed to enforce, and Plaintiff's alleged injuries resulting from Defendants' conduct.

26. **Count Twenty-Six**

In Count Twenty-Six, Plaintiff claims that unidentified Defendants failed to adequately train their employees, causing "the wrongs set forth in this complaint." Plaintiff has failed to identify the Defendants whose conduct caused his injuries. In addition, Plaintiff has failed to link the alleged failure to train with his injuries. Further, Plaintiff has generally alleged that he suffered "the wrongs set forth in this complaint," but fails to identify the injuries specifically related to this count. Accordingly, Count Twenty-Six will be dismissed with leave to amend.

27. **Count Twenty-Seven**

In Count Twenty-Seven, Plaintiff claims that unidentified supervisory Defendants failed to adequately supervise other unidentified Defendants,

resulting in the injuries set out in the Fourth Amended Complaint. Conclusory and vague allegations will not support a cause of action. Ivey v. Board of Regents of the Univ. of Alaska, 673 F.2d 266 (9th Cir. 1982). Even a liberal interpretation of a civil rights complaint may not supply essential elements, of the claim that were not initially pled. Id. at 268. Therefore, Count Twenty-Seven will be dismissed with leave to amend to allow Plaintiff to supply the required elements of his claim and to link the conduct of individual Defendants with a specific injury.

28. **Count Twenty-Eight**

In Count Twenty-Eight Plaintiff claims that unidentified Defendants failed to perform some unidentified statutory duties resulting in "the wrongs set forth in this complaint." Again, conclusory and vague allegations do not support a cause of action. Accordingly, Count Twenty-Eight will be dismissed with leave to amend to allow Plaintiff to identify individual Defendants whose conduct caused his injuries, the statutory duties they failed to perform, and to link this conduct to a specific injury suffered by Plaintiff.

29. **Count Twenty-Nine**

In Count Twenty-Nine, Plaintiff claims unidentified Defendants acted in excess of their authority in some unidentified circumstance. Again, conclusory and vague allegations do not support a cause of action. Accordingly, Count Twenty-Nine will be dismissed with leave to amend to allow Plaintiff to identify individual Defendants whose conduct caused his injuries and to link this conduct to a specific injury suffered by Plaintiff.

30. **Count Thirty**

In Count Thirty, Plaintiff claims:

Defendants failed to do what they should have done, failed to correctly do what they did, did incorrectly what they did, failed to exercise reasonable care in what they did, acted unjustly, all without excuse or justification, hence committing the wrongs in the complaint.

Fourth Amended Complaint, Add. at 10.

Plaintiff's vague allegations fail to state a claim. Accordingly, Count Thirty will be dismissed with leave to amend to allow Plaintiff to identify individual Defendants whose conduct caused his injuries and to link this conduct to a specific injury suffered by Plaintiff.

31. Count Thirty-One

In Count Thirty-One, Plaintiff claims that unidentified Defendants retaliated against Plaintiff for being East Indian and for challenging some unspecified conduct of the Defendants. Plaintiff fails to identify the Defendants whose alleged conduct caused his injury and fails to allege how Defendants retaliated against him. When an inmate brings a claim of retaliation, he must allege that the official acted in retaliation for the exercise of a constitutionally-protected right, and that the action "advanced no legitimate penological interest." Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997); Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994). Therefore, Count Thirty-One will be dismissed with leave to amend to allow Plaintiff to identify the Defendants whose conduct caused his alleged injuries, to identify the conduct Plaintiff alleges was retaliatory and to allege that the retaliatory act advanced no legitimate penological interest.

32. **Count Thirty-Two**

In Count Thirty-Two, Plaintiff appears to allege that unidentified Defendants who are employees or agents of Maricopa County engaged in a "code of silence" which enabled them to commit all of the constitutional and statutory torts alleged in his pleading. Again, conclusory and vague allegations do not support a cause of action. Accordingly, Count Thirty-Two will be dismissed with leave to amend to allow Plaintiff to identify individual Defendants whose conduct caused his injuries and to link this conduct to a specific injury suffered by Plaintiff.

33. **Count Thirty-Three**

In Count Thirty-Three, Plaintiff alleges that unidentified Defendants acted to "cover up" all of the constitutional and common law torts alleged in his pleading. This Count fails to state a claim. The Court is unaware of any constitutional or common law right to be free of "cover up." Plaintiff may not reallege this claim in the Fifth Amended Complaint unless he can demonstrate an independent and specific violation, identify the Defendants who committed the violation, and demonstrate an affirmative link between the Defendants' conduct and a specific injury.

34. **Count Thirty-Four**

In Count Thirty-Four, Plaintiff alleges that unidentified Defendants committed all the acts alleged in Plaintiff's pleading under color of state law and in violation of 42 U.S.C. § 1983. This does not state an independent claim. 42 U.S.C. § 1983 simply provides a private cause of action for a constitutional violation. There is no per se violation of § 1983. Further, the allegation that Defendants acted under color of state law is an element required of any claim of

constitutional violation. It does not of itself state a cognizable claim. Accordingly, Count Thirty-Four will be dismissed and may not be realleged in the Fifth Amended Complaint.

35. **Count Thirty-Five**

In Count Thirty-Five, Plaintiff provides a narrative relating his alleged conversations with the late Teresa Archuleta in support of his claim that a number of Defendants entered into a conspiracy to violate his constitutional rights.

"In a civil conspiracy, the conspiracy itself is not a cause of action ... it is the overt action which causes the civil injury and resulting damage." Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959), overruled on Other grounds, Cohen v. Norris, 300 1.2d 24 (9th Cir. 2 1962). Because the damage in a civil conspiracy flows from the overt acts and not from theconspiracy, the complaint "must set forth with certainty facts showing particularly what a defendant or defendants did to carry the conspiracy into effect and whether such acts, in the normal course of events, would proximately cause injury to the plaintiff." Id. Here, Plaintiff alleges the overt acts which carried the conspiracy into effect were the submission of a false affidavit in the extradition proceedings and some unspecified conduct by Defendant Ronald Harris to facilitate the improper forfeiture of Plaintiffs property.

To the extent this Count challenges the propriety of his extradition proceedings; the claim must be included upon amendment of the pleading in Count Fourteen. To the extent this Count challenges the propriety of the seizure of his property for the purpose of forfeiture; the claim must be included upon amendment of Count One. Further, Plaintiff must

specify that conduct of Defendant Harris which resulted in a specific constitutional injury. Count Thirty-Five may not be realleged in the Fifth Amended Complaint.

36. Count Thirty-Six.

In Count Thirty-Six, Plaintiff alleges that unidentified Defendants, while carrying concealed weapons, entered into a conspiracy to commit all the wrongs alleged in the pleading based on Plaintiff's East Indian origin. Plaintiff may (and has) allege specific incidents of violation of the Equal Protection Clause. However, a conclusory allegation of conspiracy which includes every injury alleged in the complaint fails to state a claim. Accordingly, Count Thirty-Six will be dismissed and may not be realleged in the Fifth Amended Complaint. The Court notes that possession of a concealed weapon is not of itself a constitutional violation and does not make the fact of a constitutional violation more or less likely. Therefore, possession of a concealed weapon by a Defendant is irrelevant, and any reference to that possession is inappropriate.

37. Count Thirty-Seven

In Count Thirty-Seven, Plaintiff alleges that unidentified Defendants engaged in a Conspiracy under 42 U.S.C. § 1985(3) to deprive him of his civil rights based on his status as an East Indian, which Plaintiff claims is a racial minority.

To state a claim under 42 U.S.C. § 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or

privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971).

Additionally, there must be some "racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. To make the requisite showing of class-based animus "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1519 (9th Cir. 1987). Plaintiff has failed to identify the Defendants whose conduct allegedly deprived him of his civil rights and to present facts which demonstrate an affirmative link between their conduct and Plaintiff's specific injury. Accordingly, this Count will be dismissed with leave to amend.

38. Count Thirty-Eight

In Count Thirty-Eight, Plaintiff alleges that Defendants engaged in the conduct alleged in Count Thirty-Seven. This claim is clearly duplicative and will be dismissed. Count Thirty-Eight may not be realleged in the Fifth Amended Complaint.

39. Count Thirty-Nine

In Count Thirty-Nine, Plaintiff alleges that Defendants violated his civil rights under 42 U.S.C. § 1981. 42 U.S.C. § 1981 "prohibits racial discrimination in the making and enforcement of private contracts." Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989). Where an alleged act of discrimination does not involve the impairment of the right to make or enforce a Contract, § 1981 provides no relief. 14. at 176. In this case, Plaintiff challenges the manner in which Defendants effected his arrest and prosecution and the seizure of his property. This case does not present the circumstance for which Congress provided a remedy

under § 1981. Accordingly, Count Thirty-Nine will be dismissed for failure to state a claim and may not be realleged in the Fifth Amended Complaint.

40. **Count Forty**

In Count Forty, Plaintiff alleges that unidentified Defendants violated 42 U.S.C. § 1986 when they failed to prevent his injuries as set out in the entire complaint. First, Plaintiff has failed to identify any Defendant in connection with this claim and has failed to link the conduct of any Defendant with his alleged injuries. Further, a claim under *42 U.S.C. § 1986* is derivative of a claim under *42 U.S.C, § 1985*. Therefore, a claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985. McCalden v, California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990), cert. denied, 504 U.S. 957 (1992). This Order dismisses Plaintiff's § 1985 claims as alleged in Counts Thirty-Seven and Thirty-Eight. Accordingly, this Count must be dismissed without prejudice.

41. **Count Forty-One**

In Count Forty-One, Plaintiff claims that unidentified Defendants "aided and abetted" each other to commit the torts alleged in the complaint. "Aiding and abetting" is a term of art of criminal law. In this instance, it is simply duplicative of Plaintiff's attempts to allege conspiracy. Accordingly, Count Forty-One will be dismissed and may not be realleged in the Fifth Amended Complaint.

42. **Count Forty-Two**

In Count Forty-Two, Plaintiff claims unidentified Defendants violated certain sections of the Arizona and California constitutions. Plaintiff does not explain how the enumerated sections of the Arizona and California

constitutions were violated. Plaintiff must identify the individual Defendants whose conduct caused his specific injuries and must affirmatively link a Defendant's conduct to a specific constitutional injury. Accordingly, Count Forty-Two
2 will be dismissed with leave to amend.

43. Count Forty-Three

In Count Forty-Three, Plaintiff claims that the Maricopa County Board of Supervisors, by authorizing the defense of Maricopa County employees who are accused of constitutional violations and the payment of judgments entered against those employees, encourages further constitutional violations. Therefore, Plaintiff claims, the past conduct of the Board of Supervisors enabled and encouraged unidentified Defendants to commit the wrongs alleged in the complaint. Plaintiff fails to state a claim.

Plaintiff relies specifically upon Trevino v. Gates, 23 F.3d 1480 (9th Cir. 1994). However, the Trevino holding is actually directed to the issue of absolute immunity of the Los Angeles City Council for the performance of certain of its duties. The court discussed the Los Angeles City Council's lack of immunity for its decisions to pay punitive damages awards for city employees on a. case-by-case basis. The court did not find that the Council's authorization of payment of punitive damages was unconstitutional. However, even if the Ninth Circuit had found the Council's actions improper, that finding would not support Plaintiff's claim. Punitive damages are awarded only upon a finding of bad faith on the part of a defendant ate Rawlings v. Apodaca, 151 Ariz. 149, 162, 726 P.214 565, 576 (1986) 19 (punitive damages are restricted to "those cases in which the defendant's

wrongful conduct was guided by evil motive").

Here, Plaintiff alleges only that the Board of Supervisors authorizes payment for the defense of county employees in civil rights litigation and the award of judgments against them. Plaintiff does not allege that the Maricopa County Board of Supervisors reviews the award of "evil motive" punitive damages and improperly authorizes payment of those awards. Accordingly, Plaintiff fails to affirmatively allege a causal connection between the Board's conduct and the alleged deliberate and "evil" acts of the county employees named as Defendants to this action. Accordingly, Count Forty-Three must be dismissed with leave to amend.

G. Application to Proceed In Forma Pauperis

In Screening the Fourth Amended Complaint, the Court performed a substantive review of the record in this case. The Court has discovered that the District Court for the Central District of California inadvertently failed to rule on Plaintiffs application to proceed in forma pauperis which was attached to the original Complaint filed on May 13, 1993. Because this case was filed prior to the enactment of the Prison Litigation Reform Act, the Court applies the pre-PLRA standard to determine whether Plaintiff should be allowed to proceed in forma pauperis and without payment of the filing fee. Under Rule 53(c), Rules of Practice of the United States District Court for the District of Arizona (1993), a prisoner was allowed to proceed without payment of the filing fee if he had less than $400 in his inmate accounts. Plaintiffs affidavit, certified by an officer of the Maricopa County Jail, indicates that at the time of filing his inmate account balance was $39.80. Accordingly, the Court will grant

Plaintiff leave to proceed in forma pauperis, nunc pro tunc, May 13, 1993.

H. Instructions and Warning of Possible Dismissal Pursuant to Rule 41.

This order screens the Fourth Amended Complaint and dismisses it with leave to amend. Presumably, it will take another order to direct that service of a screened pleading, the Fifth Amended Complaint, be effected on Defendants. Despite the lack of substantive progress in this case, the Court notes that there have been 366 documents filed in this action. Clearly, the time has come for the Court to take affirmative steps to move this case forward.

District courts have the inherent power to manage their dockets. Hamilton Copper & Steel Corp. v. Primary Steel, Inc, 898 F.2d 1428, 1429 (9th Cir. 1990). "Federal courts have broad inherent powers 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Sherman v. United States, 801 F.2d 1133, 1135 (9th Cir. 1986) (quoting Link v. Wabash Railroad, 370 U.S. 626 (1962)). "Moreover, under Rule 41, the district court has authority to order a party to take actions that aid the speedy resolution of a case, and to dismiss a party if it fails to comply with the court order." Sherman, 801 F.2d at 1134 (citation omitted). agc AlEiFcrdik v. Bonzelet, 963 F.2d 1258 (9th Cir.), geg, denied, 506 U.S. 915 (1992). Accordingly, the Court will provide Plaintiff the following instructions.

In filing his Fifth Amended Complaint, Plaintiff is limited to the amendment of his claims as designated in the Order, above. Plaintiff may allege no new counts. Plaintiff may add no new claims to existing counts. Plaintiff may add no new Defendants. Plaintiff will

refer to each claim by the number designated by the Court in this Order.

Plaintiff has demonstrated that he is unable to incorporate facts and allegations by reference and still comply with Rule 8's stricture that he make short, plain statements of his claims demonstrating that he is entitled to relief. For instance, in Count Thirty-Eight Plaintiff incorporates paragraphs from Count Thirty-Seven, which are no more than instructions to incorporate other paragraphs by reference. The result is confusing and nearly unreadable. Clearly, this method of alleging a claim does not comply with Rule 8. Further, Plaintiffs attempts to characterize his allegations in the first four pages of the Addendum are unnecessary and irrelevant to his claims. The Court refers to such sections as "What is Being Challenged," "Concealed Weapons," and the three-page narrative of events and personal opinions relating Plaintiffs contacts with the Maricopa County Attorney's Office. Any facts required to support his claims should be presented in the context of those claims in short, plain statements. The amount of detail provided by Plaintiff may be appropriate in the context of a statement of facts in support of a response to a motion for summary judgment but has no place in a complaint which already substantially exceeds the page limit set by Local Rules. The Plaintiff should also note that this Order directs him to file a Fifth Amended Complaint. Until Plaintiff complies with this Order, further motions practice is inappropriate.

Plaintiff is warned that if he fails to timely comply with every provision of this Order, or any order of the Court entered in this matter, the action will be dismissed pursuant to Rule 41(b) of the Federal Rules

of Civil Procedure. See Ferdik, supra.

IT IS THEREFORE ORDERED:

(1) That the Fourth Amended Complaint is dismissed with leave to amend. Plaintiff shall have 30 days from the date this Order is filed to amend his Fourth Amended Complaint in order to state specific allegations against proper Defendant(s), to name as Defendant(s) the individual(s) who participated in the activities alleged in his Fourth Amended Complaint, and to state what injury, if any, he has suffered as a result of the activities of the Defendant(s), all in compliance with Rule 8, Fed.R.Civ.P. The Fifth Amended Complaint must be retyped or rewritten in its entirety and may not incorporate any part of the original or Amended Complaints by reference. Any Fifth Amended Complaint submitted by Plaintiff should be clearly designated as such on the face of the document. **The Fifth Amended Complaint will be Plaintiff's final opportunity to amend;**

(2) That at all times during the pendency of this action, Plaintiff shall immediately advise the Court of any change of address and its effective date. Such notice shall be captioned. "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date, and shall not include a motion for other relief. Failure to timely file a notice of change of address may result in the dismissal of the action for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure;

(3) That a clear, legible copy of every pleading or

other document filed shall accompany each original pleading or other document filed with the Clerk for use by the District Judge or Magistrate Judge to whom the case is assigned and additional copies for each Judge in three-judge cases. au Rule 1.9(f), Rules of Practice of the U.S. District Court for the District of Arizona. Failure to comply with this requirement will result in the pleading or document being stricken without further notice to Plaintiff;

(4) That the Clerk of Court is directed to enter dismissal of this action, without prejudice and without further notice to Plaintiff, if Plaintiff fails to file a Fifth Amended Complaint within 30 days of the date this Order is filed;

(5) That Plaintiff is granted leave to proceed in forma pauperis, nunc pro tunc, May 13, 1993; and

(6) That the Clerk of Court is directed to provide Plaintiff a current court-approved form for filing a complaint pursuant to 42 U.S.C. § 1983.

DATED this 30 day of November 2001.

S/D
Roslyn O. Silver
United States District Judge

FILED COPY
APRIL 22, 2002
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al., Defendants,	)	
	)	

TO THE HONORABLE ROSLYN O SLIVER, US DISTRICT COURT JUDGE:

Before the Court for screening is the "Corrected Copy" of Plaintiff's Fifth Amended Complaint (Doc. No. 376), based on diversity jurisdiction and 42 U.S.C. §. 1983.

A. **Defendants request the Court to screen Plaintiff's Fifth Amended Complaint**

Defendants request the Court to screen Plaintiff's Fifth Amended Complaint (Doc. No. 378). The Court is required by 28 U.S.C. § 1915A(a) to. screen a prisoner complaint brought against a

governmental entity or Officer or employee of a governmental entity and to dismiss any portion on specified grounds of dismissal, including failure to state a claim'. upon which relief may be granted. The Court is also required by 28 U.S.C. 1915(e)(2)(B) to dismiss an in(rim pauperis proceeding at any time if it determines that the action fails to state a claim upon which relief is granted. Accordingly, Defendants' Request for Screening of Fifth Amended Complaint will be granted.

In his Objection to Defendants' Request for Screening (Doc. No. 379), Plaintiff argues that the Fifth Amended Complaint is not subject to the screening requirement of these sections because he filed this case in 1993 and 1995, before the enactment of the Prison Litigation Reform Act ("PLRA"). Plaintiff provides no authority for his position, and he is incorrect. The requirement of § 1915(e)(2) that the Court dismiss a case au Aponte at any time if the complaint fails to state a claim on which relief may be granted is a procedural rule that does not impair prisoners' substantive rights and is thus applied retroactively to cases pending on or after April 26, 1996. Marks .v Soicutii, 98 F.3d. 494, 496 (9th.. Cir. 1996) (per curiam). Although the Court has located no authority addressing the retroactive application of § 1915A in this circuit, the Ninth Circuit's reasoning in Marks with regard to § 1915(e)(2) is also applicable to § 1915A. Both provision mandate the dismissal of claims for failure to state a claim upon which relief may be granted. Like § 1915(e)(2), § 1915A is .a procedural rule which does not impair Plaintiff's substantive rights.

In their Request for Screening of Fifth Amended Complaint, Defendants also ask the Court to identify

which claims require a response and which Defendants are involved. The Court will separately address each claim in the Fifth Amended Complaint, specifically stating whether each one is dismissed or retained. .A response will be required for each claim not dismissed or stricken by this Order. Only those Defendants specifically named in a count will be required to answer that count.

B. Fifth Amended Complaint

Plaintiff filed the "Corrected Copy" of his Fifth Amended Complaint (Doc. No. 376) in response to the Order of December. 4, 2001, which screened the Fourth Amended Complaint and granted Plaintiff leave to amend designated claims (Doc. No. 367). The Court ordered Plaintiff to allege no new counts or Defendants in his Fifth Amended Complaint. Named as Defendants in the caption of the Fifth Amended Complaint are: Gunn McKay-,. Dean Chatfield; Terry Blake; Donald.E. C9nrad; Richard Mesh; Richard M. Rornley; Ronald" Harris; Vicente Tolino; Gerald Grant; Estate of Teresa Archuleta; Estate of Ed King; Jessica Funkhouser; Betsey Bayless; Tom Rawles; Don Stapley; Mary Rose Wilcox; and Maricopa County. Plaintiff seeks monetary damages and injunctive relief.

1. Count One

Count One will be retained because Plaintiff has identified individual Defendants who allegedly seized his property in violation of the Fourth Amendment.

2. Count Two

Count Two will be retained because Plaintiff has identified individual Defendants who allegedly seized his property in violation of the California Constitution, Article I §§ 7, 13 and 15: This Count is construed only as a claim for deprivation of property without due

process of law and in denial of equal protection of the laws. No other claim which could be raised under Article I § 15, which also addresses issues such as speedy trial and attendance of witnesses in connection with a criminal trial, is included in this Count.

3. **Count Three**

Count Three will be retained because Plaintiff has identified individual Defendants who allegedly entered his office and seized his property, thereby committing the tort of wrongful seizure under California law.

4. **Count Four**[26]

Count Four will be retained because Plaintiff has identified, individual Defendants who allegedly committed the tort of invasion of privacy under California law.

5. **Count Five**

Count Five for abuse of process under federal law will be retained. Plaintiff has identified the individual Defendants who allegedly injured him and has alleged the source of law under which this claim arises.

6. **Count Six**[27]

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[26] In the Fourth Amended Complaint, Count Four alleged that Defendants manufactured probable cause for the search and seizure of Plaintiffs property in violation of the Fourth and Fourteenth Amendments (Doc. No. 321). This Count was dismissed by the December 4, 2001 Order (Doc. No. 367). Plaintiff now uses Count Four in the Fifth Amended Complaint to refer to his claim for invasion of privacy under California law,, which was included in Count Three of the Fourth Amended Complaint.

[27] Count Six of the Fourth Amended Complaint alleged claims such as false arrest of property.. That Count was

Count Six for abuse of process under California law will be retained. Plaintiff has identified the individual Defendants who allegedly injured him and has alleged the source of law under which this claim arises.

7. **Count Seven**[28]

8. **Count Eight**[29]

9. **Count Nine**

Count Nine will be retained because Plaintiff has identified individual Defendants who allegedly committed tortuous theft under California state law when they seized his property.

10. **Count Ten,**

Count Ten will be retained because Plaintiff has identified individual Defendants who allegedly impaired' the goodwill associated with his former business when they seized computer hardware, software and records necessary to the function of his business.

11. **Count Eleven**[30]

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dismissed by Order of December 4, 2001. The claim for abuse of process under California law, previously combined with a federal law claim for abuse of process in Count Five of the Fourth Amended Complaint, is now presented as Count Six.

[28] Count Seven of the Fourth Amended Complaint was dismissed by Order of December 4, 2001.

[29] Count Eight of the Fourth Amended Complaint was dismissed by Order of December 4, 2001.

[30] Count Eleven of the Fourth Amended Complaint alleged theft, which was dismissed as duplicative by Order of December 4, 2001. Plaintiff's claim for a takings violation under California law, previously combined with a similar

In Count Eleven, Plaintiff alleges that the seizure of his property without compensation violated the takings clause of the California Constitution. Article I, section 19 of the California Constitution provides, "Private property may be taken or damaged for public use only when just compensation . . . has been paid to . the owner." Plaintiff does not allege, nor do the facts he alleges support the inference, that his property was seized for "public use." Accordingly, this Count will be dismissed.

12. Count Twelve

In Count Twelve, Plaintiff alleges that the seizure of his property without compensation violated the takings clause of the United States Constitution, which provides, "nor shall private property be taken for public use without just compensation." Plaintiff does not allege, nor do the facts he alleges support the inference, that his property was seized for "public use." Accordingly, this Court will be dismissed.

13. Count Thirteen[31]

14. Count Fourteen

Count Fourteen will be retained. Plaintiff has identified the individual Defendants • who allegedly violated the procedural protections secured him under the federal extradition statute, 18 U.S.C. § 3182, and under the Uniform Criminal Extradition Act, Cal. Penal Code §§ 1547-56.2.

15. Count Fifteen,[32]

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claim under the federal Constitution in Count Twelve of the Fourth Amended Complaint, is now presented as Count Eleven.

[31] Count Thirteen of the Fourth Amended Complaint was dismissed by Order of December 4, 2001.

16. **Count Sixteen**

Count Sixteen will be retained Plaintiff has identified the individual Defendants who allegedly detained him for 115 days without obtaining. a judicial determination on the issue of probable cause. Zee Gerstein Y. Pugh, 420 U.S. 103, 95 S. Ct. 854:(1975) (holding that Fourth Amendment requires judicial determination of probable cause as prerequisite to detention).

17. **Count Seventeen**

Count Seventeen will be retained because Plaintiff has provided allegations sufficient to state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment.

18. **Count Eighteen**[33]

19. **Count Nineteen**

Count Nineteen for violation of the Due Process Clause of the Fourteenth Amendment will be retained. Plaintiff has alleged an affirmative link between his injury and the conduct of Defendants Grant, Romley, McKay Mesh, Tolino and Harris, who incorrectly advised Blake, Conrad and Chatfield to commit the acts set out in this. Count. Plaintiff has also alleged an affirmative link between his injury and the conduct of Defendants Blake, Conrad and Chatfield, who followed the advice even though they knew it was wrong.

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[32] Count Fifteen of the Fourth Amended Complaint was dismissed by Order of December 4, 2001.

[33] Count Eighteen of the Fourth Amended Complaint was dismissed by Order of December .4, 2001; As noted in the Order of December 4, 2001, the Fourth Amended Complaint contained 28 no Count Twenty.

Counts Twenty-Two, Twenty-tight, Thirty-Two and Thirty-Three allege, respectively, that the following actions violated the Fourteenth Amendment: (1) the failure of Romley to promulgate policies; (2) the alleged breach of contract described in Count Twenty-Three; (3) the "code of silence" existing between Defendants as Maricopa County employees; and (4) the "cover-up" of Defendants' alleged wrongs.. These Counts are duplicative 'of Count Nineteen and shall be incorporated into Count Nineteen.

20. Count Twenty[34]

21. Count Twenty-One

Count Twenty-One will be retained. Plaintiff has identified the individual Defendants who allegedly tortuously interfered with prospective business relationships, or prospective economic advantage, under California law.

22. Count Twenty-Two[35]

23. Count Twenty-Three

Count Twenty-Three will be dismissed because there is no general federal cause of action for breach of contract, and Plaintiff has not alleged the existence of any federal statute that would provide Plaintiff with a claim rot' breach of contract.

24. Count Twenty-Four[36]

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[34] As noted in the Order dated December 4, 2001, the Fourth Amended Complaint contained no Count Twenty

[35] Count Twenty-Two, which alleges a violation of the Fourteenth Amendment, is incorporated into Count Nineteen. Accordingly, Count Twenty-Two will no longer be treated as a separate Count

[36] Count Twenty-Four of the Fourth Amended Complaint vaguely alleged that Defendants violated

Count Twenty-Four for breach of contract under California law will be retained. Plaintiff has identified the individual Defendants who allegedly breached alleged oral and written contracts under which Plaintiff was to waive certain claims against Defendants in exchange for receiving certain documents and evidence.

25. Count Twenty-Five[37]

Count Twenty-Five will be 'dismissed because there is no general federal cause of action for fraud, and Plaintiff has not alleged the existence of any federal statute that would provide Plaintiff with a claim for fraud.

26. Count Twenty-Six[38]

Count Twenty-Six for fraud under California law

Plaintiffs rights. In Count Twenty-Four of the Fifth Amended Complaint Plaintiff instead asserts a claim for breach of contract under California law. This claim was formerly included in Count Twenty-Three of the Fourth Amended Complaint.

[37] Count Twenty-Five of the Fourth Amended Complaint alleged that Defendants failed to enforce rules and regulations. In Count Twenty-Five of the Fifth Amended Complaint, Plaintiff instead asserts a claim for fraud under federal law, which was formerly included in Count Twenty-Three of the Fourth Amended Complaint.

[38] Count Twenty-Six of the Fourth Amended Complaint alleged failure to train by Defendants.' In Count Twenty-Six of the Fifth Amended Complaint, Plaintiff instead asserts a claim for fraud under California law. This claim was formerly included in Count Twenty-Three of the Fourth Amended Complaint.

will be dismissed because Plaintiff has not alleged the elements of fraud under California law. "The elements of fraud, which give rise to the tort' action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or `Scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Lazar v. Superior Court, 909 P.2d 981, 984-85, 12 Cal.4th 631, 638 (1996) (citation omitted).

Plaintiff alleges in Count Twenty-Three,. which he incorporates into this Count by reference, that Defendants entered oral and written contracts to provide Plaintiff with certain documents and evidence in exchange for Defendant waiving certain claims against them.

Plaintiff further alleges that at the time Defendants entered the contracts, they had no intention of giving Plaintiff the documents and evidence they agreed to provide. Fatal to Plaintiff's fraud claim is the lack of an allegation that he detrimentally relied on Defendants' allegedly false representations. Plaintiff alleges that the contract required him to waive certain claims against Defendants, but Plaintiff does not allege that he ever did in fact waive those unidentified claims or take any other action to his detriment based on Defendants' false representations.

27. Count Twenty -Seven

Count Twenty-Seven will be dismissed because there exists no separate cause of action for failure to supervise. '

28. Count Twenty-Eight[39]

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[39] Count Twenty-Eight, which alleged a violation of the Fourteenth Amendment, is incorporated into Count

29. **Count Twenty-Nine**[40]

Count Twenty-Nine will be retained. Plaintiff has identified the individual Defendants who allegedly denied him access to the courts by acting as alleged in Count Twenty-Three. Further, although this Count is vague, the Court finds for purposes of screening that Plaintiff has also alleged an actual injury as a result of Defendants' actions. An "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim " Lewis v. Casey, 518 U.S. 343, 348, 116 S. Ct. 2174, 2178 (1996): To show actual injury with respect to contemplated litigation, Plaintiff must demonstrate that the conduct of Defendants prevented him from bringing to court a nonfrivolous claim that he wished to present. jd. at 352-53, 116 S. Ct. at 2180-181. That nonfrivolous claim must be a direct or collateral attack on the inmate's sentence, or a challenge to the conditions of his confinement. LI at 355, 116 S. Ct. at 2182. It is not clear from the Fifth Amended Complaint whether the claim Plaintiff alleges he was unable to present was an attack on his sentence or a challenge to the conditions of his confinement. If it

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Nineteen. Accordingly, Count Twenty-Eight will no longer be treated as 28 a separate Count.

[40] Count Twenty-Nine of the Fourth Amended Complaint presented a claim that Defendants acted in excess of the authority vested in them by the Arizona legislature. In Count Twenty-Nine of the Fifth Amended Complaint, however: he alleges that Defendants violated Plaintiff's right of access to the courts. This right of access claim was formerly included in Count Twenty-Three of the Fourth Amended Complaint.

becomes clear that the contemplated claim was an attack on his sentence, this Count will immediately be dismissed pursuant to Beck y. Humphrey, 512 U.S. 477, 114 S. Ct. 2364.

30. Count Thirty[41]

31. Count Thirty-One

Count Thirty-One will be retained. Plaintiff has 'identified Defendants who allegedly retaliated against him and has otherwise amended this Count in compliance with the December 4;2001 Order.

32. Count Thirty-Two[42]

33. Count Thirty-Three[43]

34. Count Thirty-Four[44]

35. Count Thirty-Five[45]

36. Count Thirty-Six

Count Thirty-Six for violation of California Civil Code § 51.7 was dismissed by Order of December 4,

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[41] Count Thirty was dismissed with leave to amend by Order of December 4, 2001. Plaintiff did not amend and did not allege a Count Thirty in. his Fifth Amended Complaint.

[42] Count Thirty-Two, which alleged a violation of the Fourteenth Amendment, is incorporated into Count Nineteen. Accordingly, Count Thirty-Two will no longer be treated as a separate Count.

[43] Count Thirty-Three, which alleged a violation of the incorporated into Count Nineteen: Accordingly, Count Thirty-Three separate Count.

[44] Count Thirty-Four of the Fourth Amended Complaint December 4, 2001

[45] Count Thirty-Five of the Fourth Amended Complaint December 4, 2001.

2001. On January 4,.2001, Plaintiff filed a Motion for Reconsideration, which was denied (Doc. No. 371). .Accordingly, Count Thirty-Six will be stricken from the Fifth Amended Complaint because it was previously dismissed and was brought again without leave of Court.

37. Count Thirty-Seven

Count Thirty-Seven 'for conspiracy under 42* U.S.C. § 1985(3) will be retained. , Plaintiff has identified the Defendants whose conduct allegedly deprived him of his civil rights. Plaintiff has also alleged the elements of a § 1985(3) claim: (1) a conspiracy; (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act by one of the conspirators in furtherance of the conspiracy; and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States. Oriffit v. Breckenridge., 403 U.S. 88, 102-103, 91 S. Ct. 1790, 1798,99 (1971).

38. Count Thirty-Eight[46]

39. Count Thirty-Nine[47]

40. Count Forty[48]

41. Count Forty-One[49]

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[46] Count Thirty-Eight of the Fourth Amended Complaint was dismissed by Order of December 4, 2001.

[47] Count Thirty-nine of the Fourth Amended Complaint was dismissed by order of December 4, 2001.

[48] Count forty of the Fourth Amended Complaint was dismissed by order of December 4, 2001.

[49] Count forty-one of the Fourth Amended Complaint was dismissed by order of December 4, 2001.

42. **Count Forty-Two**[50]

43. **Count Forty-Three**

Count Forty-Three will be retained against the Maricopa County Board of Supervisors, which allegedly reviews the award of punitive damages imposed against its employees on a case-by-case basis and improperly authorizes payment of those awards. Plaintiff alleges that this practice has allowed and encouraged Defendants Chatfield, Conrad, McKay, Harris, Romley, Mesh, Archuleta, Tolino and Grant to continue to engage in the actions which have allegedly harmed Plaintiff. Plaintiff has thus alleged a causal connection between the Board's conduct and the alleged deliberate and "evil" acts of the Defendant county employees: ,See Trevino v, Gates, 23 F.3d 1480, 1482-83 and n.3 (9th Cir.), cert. Agniell, 513 U.S. 932, 115 S. Ct. 327 (1994) (holding Los Angeles City Council not entitled to absolute immunity for improper case-by-case authorization of payment of punitive damages against police when this contributed to commission of constitutional violations by police, but not considering whether such claim sufficient on the merits to survive a motion to dismiss-or -motion for summary judgment).

C. Status of Defendants

1. Dismissal of Defendant Funkhouser

Although named in the heading of the Fifth Amended Complaint, Defendant Jessica Funkhouser is not alleged in the pleading to have taken any action in violation of Plaintiff's rights. Accordingly, Funkhouser will be dismissed from this action.

2. Unserved Defendants

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[50] Count forty-two of the Fourth Amended Complaint was dismissed by order of December 4, 2001.

The Court has previously noted that Betsey Bayless, Torn Rawles, Ed King, Don Stapley and Mary Rose Wilcox (the individual members of the Maricopa County Board of Supervisors) have not appeared as Defendants in this action: Sge United States Magistrate Judge M. Silver's February 5, 2001 determination that the individual members of the. Maricopa County Board of Supervisors has not appeared as Defendants (Doc. No. 356) and the denial of Plaintiff's appeal of that decision by Order of August 9, 2001 (Doc. No. 366).

Although this Court upheld the determination that Bayless, Rawles, King, Stapley, and Wilcox have not appeared as Defendants in this action, their dismissal from this action cannot occur unless Plaintiff first receives notice. See. Rule 4(m), Federal Rules of Civil Procedure. Accordingly, Plaintiff shall have twenty (20) days from the date this Order is filed to show good cause why Defendants Bayless, Rawles, King, Stapley and Wilcox should not be dismissed from this action for failure to timely effect service of process as provided by Rule 4(m) of the Federal Rules of Civil Procedure and Rule 2.12(b)(3)(B)(i) of the Local: Rules of Practice. If Plaintiff fails to timely respond to this Order, or fails to show good cause, the action will be dismissed„as to Defendants Bayless, Rawles, King, Stapley and Wilcox. See, FedR.Civ.P. 4(m); Fed.R.Civ.P. 41(b); Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir.) (District court may dismiss action for failure to comply with any order of the Court), cert. denied, 506 U.S. 915,113 8. Ct..321 (1992),

D. **Further Discovery and Dispositive motions**

In their Request for Screening of Fifth Amended Complaint, Defendants advise the Court that they

wish to set discovery and dispositive motion deadlines as to the remaining claims and parties (Doc. No. 378 at 2). Plaintiff counters that an answer should be ordered and the case set for trial (Doc. No. 379). The Court does not decide this issue here.

Defendants must file any Request for a Rule Conference within thirty (30) days of the date of entry of this Order. Upon the filing of such a motion by Defendants, United States Magistrate Judge David K.. Duncan shall hold a hearing at which the parties will address whether further discovery is necessary to enable them to file a dispositive motion with regard to the claims remaining in the Fifth Amended Complaint.' The Court has dismissed various &tins throughout this action. Plaintiff was not permitted to bring new claims or name new Defendants in his Fifth Amended Complaint. Because the scope of this case has only narrowed over time, it appears that the Fifth Amended Complaint, as screened, would not require Defendants to respond to any new claims. Thug, the discovery already completed by Defendants- may be adequate. Magistrate Judge Duncan shall notify the parties of the date and time of the hearing.

IT IS THEREFORE ORDERED that Defendants' Motion for Screening of Fifth Amended Complaint (Doc. No. 378) is GRANTED.

IT IS FURTHER ORDERED that the following Counts are DISMISSED for failure to state a claim upon which relief may be granted: Count Eleven, Count Twelve, Count Twenty-Three, Count Twenty-Five, Count Twenty-Six and Count Twenty-Seven.

IT IS FURTFIER ORDERED that Count Thirty-Six is STRICKEN because .it was brought in violation of

the December 4, 2001 Order.

IT IS FURTHER ORDERED that Defendant Jessica Funkhouser is DISMISSED from this action.

IT IS FURTHER ORDERED that Plaintiff shall, within twenty (20) days from the date this Order is filed, show good cause why Defendants Bayless, Rawles, King Wilcox should not be dismissed from this action for failure to timely effect service Wilcox should not be dismissed from this action for failure to timely effect service of the Local Rules of Practice. If Plaintiff fails to timely respond to this Order how good cause, the action will be dismissed as to Defendants Bayless; Rawley, Stapley and Wilcox.

IT IS FURTHER ORDERED that a copy of the Fifth Amended Complaint (Doc. No. 376), along with a copy of this Order, shall be sent to each Defendant named in this action.

IT IS FURTHER ORDERED that Defendants shall file any Request for a Rule 16 Conference within thirty (30) days from the date this Order is filed.

DATED this 19th day of April, 2002.

S/D_____
ROSLYN O SILVER
US District Court Judge

FILED COPY
JULY 15, 2002
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati,)	
Plaintiff,)	
v.)	
)	**REPORT AND**
Gunn McKay, et al.,)	**RECOMMENDAT**
Defendants,)	**ION**
)	

TO THE HONORABLE ROSLYN O SLIVER, US DISTRICT COURT JUDGE:

On this date, pursuant to the District Court's Order (Doc # 380), the undersigned Magistrate Judge held a Rule 16 Telephonic Conference to address whether further discovery was necessary. Defendant's asked to take Plaintiff Anant Tripati's deposition. The magistrate ordered that Tripati's deposition be completed by August 23, 2002; NO party made any ;other request for specific discovery: The Plaintiff indicated that he anticipated the need for three trial days to present his .case and the Defendants' counsel represented that Defendants' case would require two trial days:

The Magistrate Judge believes that upon completion of Plaintiff's deposition this case's extensive procedural history, the Magistrate Judge does not believe any further time should be allowed for the filing of dispositive motions. "Such further motion practice would be inefficient and contrary to the spirit and letter of Rule 1 of the Federal Rules of Civil Procedure.

Accordingly, IT IS RECOMMENDED that the District Court set this matter for a five day trial commencing at a time to be selected by the District Court no sooner than October 23, 2002.

DATED this 12th Day of July, 2002.

S/D_____
David K. Duncan
United States Magistrate Judge

FILED COPY
JUN 11 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,	)	
v.	)	
	)	**ORDER**
Gunn McKay, et al., Defendants,	)	

Pending before the Court is the Magistrate Judge's Report and Recommendation filed on July 15, 2002 (Doc, No. 401).

BACKGROUND

The Magistrate Judge held a Rule 16 Telephonic Conference to determine whether further discovery is necessary before trial of this matter. At that conference, the Magistrate Judge ordered that Defendants complete Plaintiff's deposition by August 23, 2002. The Magistrate Judge determined that no further time was needed for dispositive motions.

Accordingly, the Magistrate Judge recommended that this case be set for a five day trial based on the Plaintiffs anticipated need for three days to present his case and Defendants' anticipated need for two days.

DISCUSSION

Any party who disagrees with a Magistrate Judge's recommendations "may serve and file written objections." *28 U.S.C. § 636(b)(1).* The Court must conduct a de novo review of the legal analysis in the Report and Recommendation. *See 28 U.S.C. § 636(b)(1)(C).* The Court must review the factual analysis in the Report and Recommendation de novo for those facts for which objections are filed and for clear error for those facts for which no objections are filed. Id.; *Local Rule 1.15(b);* see also Barilla v. Ervin, 886 F.2d 1514 (9th Cir 1989) (failure to file objections relieves the district court of conducting a de novo review of the magistrate's factual findings). A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *28 U.S.C. § 636(b)(1).*

No party filed written objections to the July 15, 2002 Report and Recommendation, and the Court adopts the Report and Recommendation.

IT IS THEREFORE ORDERED:

(1) That the Magistrate Judge's Report and Recommendation filed on July 15, 2002 (Doc.

No. 401) is ADOPTED; and

(2) That this case will be set for a five day trial at a date to be determined at the June 16, 2003 Status Conference;

DATED this 10 day of June, 2002,

S/D_____
ROSYLN O SLIVER
US District Court Judge

FILED COPY
JUN 11 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. 94-0170-PHX-ROS (DKD)
Anant Kumar Tripati, Plaintiff,)	
v.)	
)	**ORDER**
Gunn McKay, et al., Defendants,)	

Pending before the Court are four motions filed by Plaintiff in preparation for trial.

A. **Motion for Use of a Jury Questionnaire**

Plaintiff moves for leave to use a jury questionnaire consisting of 94 questions, suggesting that this will avoid any hidden bias resulting from the events of September 11, 2001 (Doc. No. 411). Voir dire in federal court is performed by the Court with the use of a standard questionnaire completed by each prospective juror. The parties will have the opportunity to use the answers provided to the questionnaire used in every civil rights action brought to trial.

Accordingly, Plaintiffs Motion for Use of a Jury

Questionnaire (Doc. No.411) will be denied without prejudice to Plaintiff requesting the use of specific questions during voir dire.

B. Application for Writ of Habeas Corpus Testificandum and Request to Tax Costs of Transportation to Plaintiff.

Plaintiff moves for an order directing the ADOC to transport him to the scheduled June 16, 2003 Status Heating and taxing costs to Plaintiff (Doc. No. 423). However, the Court in its Order of May 29, 2003 (Doc. No. 428) directed that ADOC secure Plaintiffs presence at the Status Hearing scheduled for Monday, June 16, 2003 at 11:00 a.m. This matter has been addressed. Plaintiffs Motion will be denied as moot.

C. First Motion Inlimine

Plaintiff claims that Defendants have failed to comply with numerous discovery requests. Plaintiff moves to bar Defendants from using any evidence or witnesses' not previously disclosed, Plaintiffs Motion in Litnine (Doc. No. 425) will be taken up at the June 16, 2003 Status Hearing.

D. Motion for Sanctions

Plaintiff complains that defense counsel "insists on disputing" various facts and asks that counsel be sanctioned (Doc. No. 431). Plaintiffs Motion for Sanctions will be denied.

IT IS 'THEREFORE ORDERED:

(1) Plaintiffs Motion for Use of a Jury Questionnaire (Doc. No. 411) is **DENIED WITHOUT PREJUDICE** to Plaintiff requesting the use of specific questions during voir dire;

(2) Plaintiffs Application for Writ of Habeas

Corpus Testificandum and Request to Tax Costs of Transportation to Plaintiff (Doc. No. 423) is **DENIED AS MOOT**; and

(3) That Plaintiffs Motion for Sanctions (Doc. No. 431) is DENIED.

DATED this 10 day of June, 2003.

S/D_____
ROSYLN O SILVER
US District Court Judge

FILED COPY
JUN 22 2004
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

	)	No. 94-0170-PHX-ROS (DKD)
	)	
Anant Kumar Tripati,	)	
Plaintiff,	)	
v.	)	
	)	ORDER
Gunn McKay, et al.,	)	
Defendants.	)	
	)	

Plaintiff has filed a Motion for Change of Judge for Cause (Doc. No. 575) pursuant to 28 U.S.C. §§ 144 and 455. The Court finds that this judge is not required to recuse herself in this case; therefore, the § 455' Motion for Recusal will be denied. The Motion for Change of Judge Pursuant to § 1442 will be referred to another District Judge.

28 U.S.C. § 455 states, in relevant part:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned

He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.] 28 U.S.C. § 144 states: § 144. Bias or prejudice of judge

A. Relationship Between Sections 455 and 144

Although the substantive test for personal bias and prejudice is the same under both § 455 and § 144, their procedural requirements differ. U.S. v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). To invoke the provisions of § 144, the movant must file a "timely and sufficient" affidavit stating the facts and reasons for the movant's belief that bias or prejudice exists.

The judge at whom such a motion is directed may determine only the timeliness and sufficiency of the affidavit. c If the affidavit is timely and sufficient, the motion must be referred to another judge for a determination of its merits. Id. Section 455 does not require referral to another judge. In Sibla, the Ninth Circuit stated: c In light of the difference in procedures for sections 144 and 455, it is apparent that the two sections are not redundant but are complementary, even when the only ground for recusal alleged is bias or prejudice. A party desiring referral to a second judge upon a determination of legal sufficiency may invoke the provisions of section 144 by filing a motion under that section accompanied by a timely and sufficient affidavit. Such a motion should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of section 455(a) & (b)(1), a matter which rests within the sound discretion of the judge. Thus, section 455 modifies

section 144 in requiring the judge to go beyond the section 144 affidavit and consider the merits of the motion pursuant to section 455(a) & (b)(1).

The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple. If, after considering all the circumstances, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144. Id., 624 F.2d at 868 (citation omitted).

B. Motion for Recusal Pursuant to § 455

Legal Standards

Any judge of the United States shall disqualify herself if her impartiality might reasonably be questioned, or where she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.... or—.[* acting as a lawyer in the proceeding[.]" 28 U.S.C. §§ 455(a), 455(b)(1), (b)(5). Section 455 imposes a self-enforcing duty on the judge to consider whether to disqualify herself. Consequently, the judge at whom the motion is directed must determine whether her bias or prejudice is shown. The challenged judge need not treat the movant's allegations as true. Sibla, 624 F.2d at 868; Weatherhead v. Globe Ina Inc., 832 F.2d 1226, 1227 (10th Cir. 1987). The judge must instead go beyond the movant's affidavit and consider all the surrounding circumstances. Sibla, 624 F.2d at 868.

Plaintiff may not base a motion for recusal solely on rulings made during the course of the proceedings. Liteky v. United States, 510 U.S. 540, 555 (1994)

("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"); Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1045-46 (9th Cir. 1987), affd, 496 U.S. 543 (1990); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) ("a judge's prior adverse ruling is not sufficient cause for recusal"). Plaintiff has the burden of showing extrajudicial bias or prejudice. See Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987).

Discussion

Plaintiff filed the instant Motion for Change of Judge after the September 17, 2003 Final Pretrial Conference, when the Court granted judgment as a matter of law for Defendants. Plaintiff contends that this Court demonstrated bias and prejudice based on events at the Final Pretrial Conference. Plaintiff claims that the Court was "hostile" to him, failed to allow him to complete his answers, failed to require Defendants to orally address the issues, "acted as the lawyer for the defendants," and failed to rule consistently with its earlier decisions. Plaintiff also relies on his own unspecified "personal experience" with the Court as evidence of bias. Plaintiff submits the transcript of the Final Pretrial Conference as an attachment to his Motion. Plaintiff could have raised these issues on appeal following entry of judgment on October 15, 2003 (Doc. No. 563). Plaintiff characterizes the Court's adverse rulings at the Final Pretrial Conference as motivated by bias and based on nothing "other than her questions set forth in the transcripts" (Doc. No. 575 at 2). In fact, the Court based its rulings on Plaintiffs answers to those questions in light of all papers submitted in preparation for the Conference. Further,

the Court as acknowledged did read all papers filed including all the papers filed by the Defendants. The Court's questions were based on issues raised by the Defendants and Plaintiff, responses made by Plaintiff and Defendants, and the Court's independent review and application of applicable authority. Before the Conference, the Court had reviewed the motions in limine and the voluminous other documents filed by the parties, as reflected on the first page of the October 16, 2003 Order, which stated that the Court had reviewed "all the pleadings in connection with the trial, including the Joint Pretrial Order and attachments, and of all pending motions (including motions in limine and objections), responses, statements of fact and exhibits thereto" (Doc. No. 562).

Plaintiffs claim that the Court was "hostile," even if such claim were true, does not support an allegation of impermissible bias or prejudice because: opinions formed by the on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. (emphasis added)

****

Not establishing bias or partiality ... are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A

judge's ordinary efforts at courtroom administration remain immune. Liteky, 510 U.S. at 555.

Plaintiff asserts that the method of questioning him and the lack of questioning of Defendants indicates that the Court "acted as the advocate for the defendants" (Doc. No. 575 at 2). This phrasing is similar to that of § 455(b)(5), which provides that a judge must disqualify herself if she is "acting as a lawyer in the proceeding." However, this judge did not act as the attorney for Defendants but simply fulfilled its duty to examine Plaintiffs claims and evidentiary support for those claims. The Court, and not Plaintiff, was responsible for directing questions at the Conference toward the end of obtaining the information needed to reach a decision. Plaintiffs conclusory assertion that the Court advocated Defendants' position because the Court directed questions to Plaintiff during the conference is baseless.

3. **Section 455 Does Not Require Recusal**

The Court has taken into account all facts known to it in considering Plaintiffs Motion for Recusal pursuant to § 455. Regardless of how Plaintiff frames his grounds for recusal, the issue is that he is dissatisfied with unfavorable rulings, which do not constitute an adequate basis for a recusal motion. If Plaintiff did not receive an adverse ruling until the Final Pretrial Conference, it was because, despite the multiple amended pleadings, discovery proceedings, dispositive motions, and other sources of delay before this case reached that point, the issues were not fully presented until this action received its final setting for trial and the pretrial motions were submitted in preparation for the Conference. The allegation made in another document that the Court owed "favors" to unknown

Defendants (discussed below) is absurd; the Court has had no extrajudicial contact with Defendants.

Accordingly, Plaintiff's Motion for Recusal pursuant to 28 U.S.C. § 455 will be denied because he has not established that the Court's impartiality might reasonably be questioned, that the Court is personally biased or prejudiced against or in favor of any party, that the Court acted as an attorney for any party, or that any other basis for recusal under §445 applies.

C. **Motion for Change of Judge Under § 144**

Legal Standards

The mere filing of the affidavit required by § 144 does not automatically require recusal by the challenged judge. United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978). Rather, a judge challenged for alleged bias or prejudice must determine whether the affidavit is sufficient on its face. Studley, 783 F.2d at 940. In passing on the legal sufficiency of the affidavit, the challenged judge must assume that allegations contained therein are true, even if she knows them to be false. aee United States v. Balistrieri, 779 F.2d 1191, 1200 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986).

Discussion

Plaintiffs affidavit in support of his § 144 Motion for Change of Judge is inadequate. As discussed in connection with the § 455 Motion, the only basis Plaintiff provides for his allegations of bias or prejudice are adverse rulings, which "alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555.

Plaintiff has provided no facts in his affidavit to support his allegation that the Court is personally biased or prejudiced against him or in favor of any

Defendant. Based on its discussion affidavit's specific allegations in the preceding section of this Order, the Court determines that the affidavit itself is insufficient. However, the Court notes that Plaintiffhas alleged in a previous filing (Reply to Response to Plaintiffs Motion for Reconsideration, Doc. No. 572) that this judge "did not act appropriately in this case, but did a favor and this is evident by two of her pst decisions" (spelling, punctuation and emphasis as in original). Plaintiff asserts that the Court ruled contrary to its prior decisions when it ruled adversely to him, and Plaintiff claims that from those adverse rulings, "[olnc can only conclude this judge did that because she was paying back favors" (Doc. No. 572 at 2). Plaintiff provides no factual support for this vague assertion, failing to state the names of the Defendants to whom he contends this Court owed "favors" or any of the supposed facts.

3. **Section 144 Motion Will Be Referred to Another Judge**

The allegation that the Court granted judgment on the pleadings for Defendants because it owed "favors" to unspecified persons is not contained in the affidavit or the Motion for Change of Judge or Recusal (Doc. No. 575), nor does Plaintiff offer any factual support for this scurrilous statement. Nevertheless, given the history of this particular case, the Court will exercise an abundance of caution and will request that another District Judge decide the § 144 Motion for Change of Judge.

The remaining motions on the docket of this action will remain pending before this Court until after a decision has been rendered on Plaintiffs Motion for Change of Judge Pursuant to *28 U.S.C. § 144.*

IT IS ORDERED:

That Plaintiffs Motion for Recusal pursuant to 28 U.S.C. § 455 is denied;
That Plaintiffs Motion for Change of Judge pursuant to 28 U.S.C. § 144 is referred for decision to another District Judge; and
(3) That the Clerk of Court shall draw at random the name of another District Judge in the Arizona District, Phoenix Division, to hear Plaintiffs Motion for Change of Judge pursuant to 28 U.S.C. § 144.

DATED June 7, 2004,

ROSLYN SILVER

S/D_____
US District Court Judge

FILED COPY
JAN 10, 2002
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT FOR THE, DISTRICT OF ARIZONA

	)	No. CIV 94-0170
Anant Kumar Tripati,	)	No. CIV 94-0170
	)	No. CIV 94-0170
Plaintiff,	)	PHX-ROS (DKD)
	)	
	)	
vs.	)	
	)	**PLAINTIFFS 5th**
GUNN MCKAY, ET AL;	)	**AMENDED**
	)	**COMPLAINT**
Defendants,	)	**DIVERSITY**
	)	

JURISDICTION

1. I am a citizen of the Fiji Islands and defendants of Arizona. The Amount in controversy, exclusive of interest and costs, exceeds 150,000.. Defendants and each of 'them ar4e sued in their individual and official capacities.

COUNT ONE AGAINST McKAY, CHATFIELD, MESH, ROMLEY, BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY VIOLATION OF FOURTH AMENDMENT

2. Teresa Archuleta advised me on March 27, 1992 in a taped call, that McKay, Chatfield, Mesh, Blake and Archuleta had a meeting where they decided they shall send someone from their office to search my office, close my business and forfeit my assets,
3. She advised me that Richard M Romley had approved this.:
4. Without my consent, on June 24, 1992 Chatfield, Conrad and Blake went to my office in California, searched my office without probable cause, removed my property from my office and .brought that to Arizona.
5. This was done by defendants acting under color Of state law and in bad faith.
6. Fully aware that there was no basis to forfeit the property, Harris filed a forfeiture action, in which I prevailed.
7. Defendants engaged in the conduct in paragraphs 2 through 6 in compliance with the prevailing customs, traditions, policies of Maricopa County to seize property without probable cause, to file forfeiture actions without probable cause. contrary to the Fourth Amendment.•

COUNT TWO AGAINST McKAY, CHATFIELD, MESH, ROMLEY, BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY

VIOLATION OF ARTICLE 1 OF

CALIFORNIA CONSTITUTION

6. By and through the conduct set forth in paragraph 2 through 7 defendants violated Article 1 sub-section 7, 13, 15 of the California Constitution.

COUNT THREE AGAINST McKAY, CHATFIELD, MESH ROMLEY, BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY

WRONGFUL SEIZURE UNDER CALIFORNIA LAW

9.. Chatfield, Conrad and Blake were sent by McKay, Mesh, Romley, Harris, Archuleta to my office to engage in the conduct set here. They went. in my office, seized my property. They were not welcome in my office when they entered my office without my consent and removed my property. They did so in compliance without the customs, traditions and policies of Maricopa County to engage in wrongful seizure. They committed wrongful seizure under California law.

COUNT FOUR AGAINST McKAY, CHATFIELD, MESH, ROMLEY, BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY

INVASION OF PRIVACY UNDER CALIFORNIA LAW

10. Upon the instructions of McKay, Mesh, Romley, Harris, Archuleta, defendants Chatfield, Conrad and Blake entered my office without my consent. I had the right to privacy in my Office and they invaded that privacy

under California law. They did this in - compliance with the prevailing customs, traditions and policies of Maricopa County to invade people's privacy.

COUNT FIVE AGAINST McKAY, CHATFIELD, MESH, ROMLEY(BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY

ABUSE OF PROCESS UNDER FEDERAL LAW

11. I observed Chatfield remove computer files MC.StS, MC.EB, MC.INT, MC.FOR, MC.COV, MC.GUN, MC.ARS, MC.FTS,. MC.EF, MC.ST which had evidence of misconduct by defendants and employees of the county.

12. I also saw Chatfield remove a·artifica1 human intelligence software.

.13. One of the goals of the search and seizure was to destroy the property and evidence.

14. Teresa Archuleta upon the instructions of the defendants McKay,' Chatfield, Grant, Mesh, Romley, Blake, Conrad, Harris destroyed the property.

15. ;'Defendants did act in compliance with the prevailing· customs. traditions and policies of Maricopa County. to destroy evidence of misconduct by it's employees and to destroy unlawfully ·acquired property.--all under color' of state law--

16. Defendants abused process under federal law.

COUNT SIX AGAINST McKAY, CHATFIELD, MESH, EOMLET, BLAKE CONRAD HARRIS,' ARCHULETA, MARICOPA COUNTY

ABUSE OF PROCESS UNDER CALIFORNIA LAW

17. Defendants McKay, Chatfield, Mesh, Romley,' Blake, Conrad Harris, Archuleta and Maricopa County by and through the conduct in count five, violated abuse of process under California Law.

COUNT NINE AGAINST McKAY, CHATFIELD, MESH, ROMLEY, BLAKE, CONRAD, HARRIS, ARCHULETA, MARICOPA COUNTY

THEFT UNDER CALIFORNIA LAW

18. Upon the instructions of McKay, Mesh, Romley, Harris, Archuleta and as agents of Maricopa County, on June 24, 1992, Chatfield, Conrad, Blake, on June 24, 1992, without my consent, entered my office and stole my property and brought that to Arizona without judicial authorization.

COUNT TEN AGAINST CONRAD, • McKAY, CHATFIELD, • HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

IMPAIRMENT OF GOODWILL UNDER CALIFORNIA LAW

19. I had a litigation support business in California where 0 grossed in low seven figures with a client base of 7,500 lawyers. I had also designed a software with artificial human intelligence that could comeup with arguments counter to that present by the

adverse party in litigation, which software was in the testing phase.

20. On March 27, 1992.1 was advised by Archuleta that defendants shall close my business down if I shall not cooperate with them.

21. When these agents of Maricopa County and upon the directions of McKay, Harris, Romley, Mesh, Archuleta, Tolino, Grant defendants Chatfield, Conrad and Blake entered my office on June 24, 1992 'and removed my hardware, software, recording and eater destroyed these; they forced me to 'close my business. As a direct result of their actions I had to close my business. I could not sell my business as removal of the assets impaired the goodwill under California law., in bad faith.

COUNT ELEVEN AGAINST CONRAD, McKAY, CHATFIELD HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

TAKING WITHOUT JUST COMPENSATION UNDER CALIFORNIA CONSTITUTION

22. The property that Chatfield, Conrad; Blake took on June 24, 1992 with the authorization of McKay, Harris, Romley, Mesh, Grant, Archuleta, Tolino and Grant as agents of Maricopa County was taken in violation of the taking without just compensation clause for which I sought and was denied compensation. The California

Constitution entitles me to relief.

COUNT TWELVE AGAINST CONRAD, McKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA·, TOLINO, GRANT, MARICOPA COUNTY

23. The conduct in count eleven violates the taking without just compensation clause to the federal constitution committed by defendants under color of state law and taken by them in accordance with the prevailing customs, traditions and policies of Maricopa County to take property without just compensation.

COUNT FOURTEEN AGAINST CHATFIELD, McKAY, TOLINO, CONRAD, ROMLEY, BLAKE, ARCHULETA, MARICOPA COUNTY

24. As agents of Maricopa County, under color of state law, Chatfiell Co4rad, Blake, McKay, Harris, Romley, Mesh, Tolino, Grant did violate the UCEA by withholding material facts to obtain a warrant. They stated falsely I was a fugitive when the tact is I was in their custody. They did this in compliance with the practices of Maricopa County to withhold material evidence

COUNT SIXTEEN AGAINST MARICOPA COUNTY, ROMLEY, CSATFIELD,. CONRAD McKAY, ARCEOLETA,ELArE

VIOLATION OF GERSTEIN

25. Acting under color of state law as agents of Maricopa County and upon the instructions of

McKay, ArChuleta, Rbnley and in compliance with the customs and traditions of Maricopa County to hold people in custody as long as possible Chatfield, Conrad and Blake held me in custody for 115 days in violation of Gerstein.

COUNT SEVENTEEN AGAINST MARICOPA COUNTY, ROWLEY, GRANT, CHATFIELD, BLAKE, HARRIS, CONRAD, ARCHULETA, McKAY

VIOLATION OF EQUAL PROTECTION

26. I am an Mast Indian, a racial minority who *was* challenging various practices of Maricopa Comity, including it's practice of targeting racial minorities for searches,, seizures, forfeitures.

27. *I* was a6ised by Teresa Archuleta that McKay called me a '!Sand Nigger" who must be restrained at all costs and this is one of the reasons why my property was seized and destroyed and also subjected to an unsuccessful forfeiture.

.28. Defendants Chatfield, Blake and Conrad seized my property and did so on the advice of Romley, Grant, Harris, Archuleta and McKay as agents of Maricopa County and under color of state law.

29. I was targeted by defendants and defendants engaged in the conduct set forth in this count *as I am an* East Indian, a racial minority.

30. Had I not been a racial minority this would not have happened.

31. The conduct of defendants serves no rational governmental goal.

32. Defendants seized and destroyed the evidence that I had about this issue and

did so on June 24, 1992. Their conduct violates the equal protection clause.

COUNT NINETEEN AGAINST GRANT, =CET, McKAY- CONRAD MESH, CHATFIELD, TOLIND, HARRIS, MARICOPA COONTY,BLAKE

VIOLATION OF FOURTEENTH AMENDMENT

33. Grant, Romley, McKay, Mesh, Tolino, Harris advised Blake Conrad and Chatfield to (a) search my office (b) bring the property to Arizona (c) withhold material evidence (d) file the forfeiture (e)'engage in the violations in this complaint (f) destroy the property and they did so under color of state law and as agents of Naricopa County and in compliance with the prevailing customs, traditions and 'policies of Naricopa County to engage in such conduct.

34. Chatfield, Conrad and Blake knew that the advice vas wrong but they did nevertheless follow the advice.

35. This offends the fourteenth amendment because but for this advice, none of this would have happened. Defendants knew their advice was wrong.

COUNT TWENTY ONE AGAINST CONRAD, MCKAY, CHATFIELD· HARRIS, RUMMY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

DENIAL OF PROSPECTIVE ROSINESS RELATIONSHIP UNDER CALIFORNIA LAW

36. I provided litigation support to in excess of 7,500 lawyers and had a low seven figure gross income.

37. On March 27, 1992 Archuleta advised me that my business shall be closed by defendants *as* they wanted to stop me.

38. *By* and through the unlawful seizure, search, forfeiture, by and through destruction of property by defendants my business failed. I was unable to cintinue with my business

because of their acts.

39. Acting as agents of Maricopa County and in accordance with it's customs to close down all businesses that challenge misconduct by employees of Maricopa County, defendants Conrad, McKay, Harri. Chatfield, Romley, Mesh, Archuleta, Tolino and Grant interfered with my prospective business relationship. My business would have continued to operate had they not destroyed the property and not taken the property. In Bad faith defendants acted and ace liable for interference with prospective business relationship under California law. Their act was intentional.

COUNT TWENTY TWO AGAINST ROMLEY AND MARICOPA COUNTY

FAILURE TO PROMULGATE

40. Richard M. Romley has the duty to promulgate appropriate rules and regulations that would prevent employees of Maricopa County from engaging in the type of conduct set forth in paragraphs 1 through 39 and 45 to 52 of this complaint.

41. He *has* intentionally refused to promulgate these rules and regulations.

42. This is because it is the prevailing custom and tradition of ..Maricopa' County to condone the type of conduct set forth in .'the complaint.

43. Had Richard M Romley promulgated appropriate polices and rules regulating the type of conduct set forth in this complaint, the wrongs I complain of would not have happened: He knew from prior complaints that his employees engaged in such

misconduct,

44. This offends the fourteenth amendment.

COUNT TWENTY THREE AGAINST CONRAD, MCKAY, CHATFIELD; HARRIS, ROME!, ARCHULETA, MESH, TOLINO, GRANT, MARICOPA COUNTY

BREACH OF CONTRACT UNDER FEDERAL LAW

45. I entered into oral and written contracts with Conrad, McKay, Chatfield, Harris, Romley, Archuleta, Mesh, Tolino, Grant, Maricopa County through their counsel.

46. In exchange for my waiving certain claims against defendants, they agreed to produce documents and evidence I needed.

47. However, at the time they entered into these contracts they had no intention of giving me the documents and evidence, did not disclose their intent and entered into contracts in bad faith.

48. They induced me to enter into the contracts approved by the court based on the representations in 46 above which they knew were false.

49. I entered into the contracts based on material misrepresentation. set forth in paragraph 46•.

50. I would not have entered into the contracts had I know the representations in paragraph 46 were false.

51. This is breach of contract under federal law.

52. The breach was in bad faith and intentionally.

COUNT TWENTY FOUR AGAINST CONRAD, McKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA. TOLINO, GRANT, MARICOPA COUNTY

BREACH OF CONTRACT UNDER CALIFORNIA LAW

53. The conduct in count twenty three is breach of contract under California law.

COUNT TWENTY FIVE AGAINST CONRAD, McKAY, CHATFIELM, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

FRAUD UNDER FEDERAL LAW

54. The conduct in count twenty three is fraUd under federal law.

COUNT TWENTY SIX AGAINST CONRAD, McKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

FRAUD UNDER CALIFORNIA LAW

55. The conduct in count twenty three is fraud under California law.

COUNT TWENTY SEVEN AGAINST RICHARD M. ROMLEY

FAILURE TO SUPERVISE

56. Richard M Romley is entrusted with the duty to supervise his employees. However, as

Maricopa County encourages the type of conduct I have complained of in this complaint, and as he does in fact encourage the type of conduct set forth by me in this complaint, he docs not adequatcly supervise his employees.

57. Had had he adequately supervised his employees, the wrongs that I have complained of in this complaint, would not have happened.

58. Romley has received so many complaints regarding similar wrongs, that, inspite of these complaints, he has opted to be passive and do nothing to prevent the complaints., all under color of state

COUNT TWENTY EIGHT AGAINST CONRAD, MCKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

DENIAL OF DUE PROCESS

59. the conduct in count twenty three was committed by defendants 11 Under color Of state law and is a violation of due process.

COUNT TWENTY NINE· AGAINST CONRAD, MCKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, MARICOPA COUNTY

DENIAL OF ACCESS TO COURTS

60. Defendants committed the acts set forth in count twenty three under color of state law. AS a direct result of their failure to comply with the terms of our agreements, I have been actually injured.

61. The materials that defendants agreed to produce were materials seized from *my* office that show the existence of the custom, tradition and policies, --- targeting racial minorities---as set forth by me.

62. These materials show misconduct by defendants.

63. In 1997 I received documentation showing that these materials were actually destroyed by Teresa Archuleta, as set forth in count twenty three.

64. I have been permanently injured--"actually injured"---by the conduct of the defendants..

65. By their actions, defendants impeded with my ability to *present my claims*, interfered with my ability to present claims.

66. By their actions, defendants have prevented me from presenting my claims.

67. Had they given me the documents/evidence they entered into the agreement to produce, I could have:

(•) given each and every complaint against the defendant, with dates, times, names of parties involved, final disposition.

68. The breach of the agreement prevents me from so doing.

COUNT THIRTY ONE AGAINST McKAY, CHATFIELD, BLAKE CONRAD, MESH, HOMEY, HARRIS, TOLINO, GRANT, ARCHULETA/ MARICOPA COUNTY RETALIATION

69. It is the prevailing custom, tradition, practice and policy of Maricopa County to

retaliate against those individuals who ,challenge the conduct of employees of Maricopa County or who challenge the prevailing customs, traditions and policies of Maricopa County. if one happens to be a racial minority, he
is treated harsher 'than non-minorities.

70. I was retaliated against by defendants McKay, Chatfield, Blake, Conrad, Mesh, Romley, Harris, Tolino, Grant, Archuleta, Maricopa County because I was challenging the practices of the County fully set forth in paragraph 70. There would have been no retaliation had I not engaged in the conduct in paragraph 70:

71. As retaliation defendants subjected me through the torts-- common law and' constitutional—set forth in this complaint, seized my property, subjected my property to forfeiture, destroyed my property, interfered with my prospective business relationship, as fully set forth in this complaint.

The conduct of the defendants advanced

COUNT THIRTY-TWO AGAINST McKAY, CHATFIELD, BLAKE, CONRAD, MESH, ROMLEy., HARRIS, TOLINO, GRANT, ARCHULETA, MARICOPA COUNTY

CODE OF SILENCE

72. Maricopa County has in existence a code of silence under which ' 'employees remain silent regarding misconduct by other employees. This court is deeply embedded in the system and is encouraged by Richard M. Romley.

73. When defendants McKay, Chatfield,

Blake, Conrad, Mesh, Harris, Romley, Tolino, Grant, Archuleta became privy to the fact that • the defendants had engaged in the conduct in this complaint, they did nothing.

74. Pursuant to the code of silence, defendants did nothing to lodge complaints regarding the seizure, forfeiture, Gerstein violation, destruction of evidence, retaliation, fully described by me in this complaint

75. Because of the code of silence, I have been injured as set forth' by me in this complaint.

76. But for the code of silence, I would not have been injured.

77. -Defendants violated the Fourteenth Amendment by the Code Of Silence.—under color of state law.

COUNT THIRTY THREE AGAINST McKAY, CHATFIELD, BLAKE, CONRAD, MESH, ROMLEY, HARRIS, TOLINO, GRANT, ARCHULETA, MARICOPA COUNTY

DENIAL OF FOURTEENTH AMENDMENT BECAUSE OF COYERUP

78. In order to prevent the wrongs set forth by plaintiff from being disclosed, defendants McKay, Chatfield, Blake, Conrad, Mesh, Romley, Harris, Tolino, Grant, Archuleta covered up for one anotherr-undercolorof state law.

79. They (a) obtained false declarations and affidavits from a Richard Goldston, which declarations/affidavits contradicted sworn testimony before Judge Candace (b)

according to evidence revealed in 1997, altered their internal records'(c) destroyed evidence (d) failed to document the misconduct set forth in this complaint.

81. They did this in compliance with the prevailing customs, policies traditions of Maricopa County"that encourages cover up.

82. The type of conduct set forth in this complaint and the coverup is deeply embedded in the Maricopa County system and but for the coverup, there would not have been any violation.

83. This offends the Fourteenth Amendment.

COUNT THIRTY SIX AGAINST CONRAD, MCKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO AND GRANT FOR VIOLATION OF CALIFORNIA CIVIL CODE 51.7

84. Under CCC 51.7 I had the right to be free from violence and intimidation by and through threats of violence and or intimidation because of my viewpoint. Defendants violated CCP 51.7.

85. According to Teresa Archuleta on **March 27, 1992 and** in **papers** received by me in 1997 and 1999, Conrad, McKay, Chatfield. Harris, Mesh, Romley, Archuleta, Tolino and Grant before engaging in the conduct in paragraphs 2 through 7, 10, 11 to 22,--had a meeting. During 'that meeting they agreed that Dean Chatfield, Donald Conrad and Terry. Blake will go to my office in California, armed with concealed weapons, so as to intimidate me with the threat of

violence, and all this due to my being an East Indian, a "Sand Nigger" according to Gunn McKay who was challenging the conduct of the defendants and of Maricopa County which conduct *is* stated *in* this complaint.

86. They did this as it was my point of view that the unpopular and disadvantaged who defendants targeted for seizure etc,. was against the law and as I was assisting the unpopular---the racial minority. .

87. Because of my views and through threats of intimidation and violence, defendants took my office equipment, property and documents, thereby causing me to close my business, which could not operate without the materials they took. They did conspire to do this as evidenced by the facts in 85 above.

COUNT THIRTYSEVEN AGAINST CONRAD, MCKAY, CHATFIELD, HARRIS, ROMLEY, MESH, ARCHULETA, TOLINO, GRANT, AND MARICOPA COUNTY TO DENY EQUAL PROTECTION OF LAWS

88. It is the custom and tradition as well as policy of Maricopa county to deny individuals who are racial minorities, the equal protection of laws and equal privileges and immunities under the laws.

89. I am an East 'Indian, a racial minority. After having a meeting as well as discussions amongst themselves, defendants Conrad, McKay, Chatfield, Harris, Romley, Mesh,

Archuleta, Tolino, Grant, acting in compliance with the prevailing customs, traditions and policies of Maricopa County, decided to deny me equal protection of the laws and equal privileges of the laws under color of state law.

90. In furtherance of the conspiracy, Chatfield, Conrad and Blake travelled to Beverly Hills, California.

91. They without my authorization seized my property, brought them to Arizona, destroyed them, caused my business to close. This would not have happened had I not been an East Indian, a racial minority and happened because of the invidious discrimination against racial minorities in Maricopa County.

COUNT FORTY THREE AGAINST MARICOPA COUNTY, BETSEY BAYLESS, TOM RAWLES, ED KING,' DON STAPLEY, MARY ROSE WILCOX AND MARICOPA COUNTY

TREVINO VIOLATION

92. Betsey Bayless, Tom Rawles, Ed King, Don Stapley, Mary Rose Wilcox, were all members of the Maricopa County Board Of Supervisors, on a case by case basis, pay punitive damages.

93. They review each case with an evil motive and in bad faith authorize payment of punitive damages. They do so improperly.

94. Defendants collectively authorize such punitive damages as it is their policy to condone, foster, approve either before or after the

fact, ratify, take no action to correct, the official procedure, practice, custom and tradition the type of wrongs I have set forth in this complaint.

95. Defendants perform this administrative functions in order to encourage employees of Maricopa County to continue to engage in the type of conduct I have set forth in this complaint. They. conduct perfunctory review and act contrary to the best interests of Maricopa County

96. Had defendants refused to pay punitive damages, • employees of Maricopa County would not engage in thc typc of wrongs I have set· forth in this complaint.

97. As Chatfield, Conrad, McKay, Harris, Romley, Mesh, Archuleta, Tolino and Grant have known that no matter what they do, any and all punitive damages awarded against them, shall be approved by defendants, they engaged in the wrong in this complaint.

98. This is a violation of Trevino v Gates, 23 F.3d·1480·(9th Cir. 1994) and its protege.

99. Defendants acted under color of state law.

DATED this 3rd of January, 2002

S/D_____
Plaintiff, ANANT TRIPATI

SW No. 34227

STATE OF CALIFORNIA-
COUNTY OF LOS ANGELES

RETURN TO SEARCH WARRANT

Richard N. Goldston, being sworn, says that he conducted a search pursuant to the below described search warrant:

Issuing magistrate:	Candace J. Beason
Magistrate's Court"	Municipal Court, Los Angeles
Date of Issuance:	June 23, 1992
Date of Service:	June 24, 1992

And searched the following locations, vehicles, and persons:

LEGAL RESEARCH ASSOCIATES of Beverly Hills, California, 8484 Wilshire Blvd., Suite # 600, Beverly Hills, CA.

MUICIPAL COURT
CLERK STAMP
JAN 05 1996

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court or of any other court in which the offense in respect to which this seized property is triable.

S/D_____SIGNATURE OF AFFIANT.

Sworn to and subscribed before me this 1st day of July, 1992.

S/D_____CANDACE J BEASON, Judge of the Municipal Court, Los Angeles County.

ORDER

Good cause being shown, it is hereby ordered that all evidence seized pursuant to this search warrant be released to the Maricopa County Attorney's Office. Maricopa County Attorney's Office promises to return and/and all evidence to Los Angeles County District Attorney's Office if a crime is discovered in the state of California.

DATED: July 1, 1992

S/D_____CANDACE J BEASON, Judge of the Municipal Court, Los Angeles County.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

RETURN OF SEARCH WARRANT

SW # 92-00172

The affiant, Dean C Chatfield, a Peace Officer in and for the State of Arizona, certifies that the above referenced Search Warrant was executed and an inventory of property taken to this search warrant is attached.

The affiant certifies that the inventory attached contains a true and detailed account of all the property taken, and that a detailed receipt for the property taken was given to Attorney Michael Machat.

S/D_____DEAN C CHATFIELD, Investigator
Maricopa County Attorney's Office

Subscribed to and sworn before me on the 25th day of June 1992.

S/D_____ Judge of the Superior Court

SEARCH WARRANT- EVIDENCE LIST

Case # 92-043

Item # 1 Balance sheet, letter from F. Cotter to Anant Tripati.
Found in northwest office in top bookcase, north wall/east door.

Item # 2 One copy of social security card. to Gustavo Hernandez, DOB 9-15-58. Found in northwest office in bookcase, north wall/bottom east drawer.

Item # 3 One invoice from Group II Computers, 7051 Maynard Avenue, date 4-20-91.Found in northwest office in bookcase, north wall/bottom east drawer.

Item # 4 One green binder containing First Interstate Bank records. Found in northwest office in bookcase, north wall/bottom/top west drawer.

Item # 5 First Interstate Bank checks, Bank of America checks,

Item #6 One computer disc #MD2HD Fuji Film #624411068001251. Found in northwest office in trash can/north wall.

Item # 7 One deposit record, Bank of America, account #122000661 03802 12420. Found in northwest office in top drawer of desk.

Item # 8 One three page letter to A & A Mortgage Co., dated June 23, 1992. Found in northwest office in trash can under desk.

Item # 9 One automatic payment/deposit reminder. Found in northwest office in top right drawer of desk.

Item #10 Articles of Incorporation of Federal Legal Research Associates, Inc., 12-10-90. Found in northwest office in second drawer of desk, right side.

Item #11 Two certificate of appraisal. #1 - 5531 N. 59 Avenue. #2 - 3316 N. Mountain View from Cotter & Company. Found in northwest office in top bookcase, north wall.

Item #12 One the "secretary" check register with statement copies of account #263324072.

Found in northwest office in top right desk drawer.

Item #13 Computer software and manual. Found in northwest office, west wail on table.

Item #14 Viva Modem. Found northwest office, west wall on table.

Item #15 VGA Monitor. Found in northwest office, west wall on table.

Item #16 One Desk Top Computer. Found in northwest office, west wall on table.

Item #17 NEC Printer. Found in northwest office, west wall on table.

Item #18 Brown box of software. Found in northwest office, on floor.

Item #19 Four (4) boxes containing computer disc. Found in northwest office on top of bookcase, north wall.

Item 020 one Solectek Pocket Fax Modem, unopened. Found in northwest office, north wall on filing cabinets.

Item #21 one Tandy 1800 Notebook Computer. Found in northwest office, north wall on cabinet.

Item #22 Bondwell Lap Top Computer. Found in northwest office, north wall on cabinets.

Item #23 Fax Line Manager (INMAC). Found in northwest office, north wall on cabinets.

Item #24 One plastic bag of shredded paper. Found in northeast copy room on floor.

Item #25 One Pitney Bowes Postal Machine #6200. Found in northeast copy room.

Item #26 Laser VGA Monitor. Found in southwest office on desk.

Item #27 User 486 SX Computer/with keyboard. Found in southwest office on desk.

Item #28 Suziba VGA Monitor. Found in southeast office area on table, west wall.

Item #29 Group II Desk Top Computer/with keyboard. Found in southeast office area on table, west wall.

Item #30 One Floppy Disc from computer. Found in southeast office area on table, west wall/in computer.

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by

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****

I have designed, with the assistance of many independent contractors, a software program **ARVITA©** (named after my daughter Arvita) which provides unique services. **ARVITA©** is a lot more helpful than any other software in the market today. At the current time, it has the following features and is designed to revolutionize the legal field:

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3. **ARVITA©** enables the lawyer to find out the complete background of the lawyer representing the adversary. Complaints and motions filed in court for sanctions, misconduct can be retrieved through **ARVITA©.**
4. ARVITA© enables lawyers to find out the position taken by judges on certain issues, their case management style, etc.
5. **ARVITA©** enables the lawyer to learn about public clients and businesses. Find out whether they have been sued and found liable for violations of federal and state laws. Learn about their practices on issues. Do they violate individual rights? Discover company and Municipal Practices.
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software to function, one must subscribe to one of the services.

In order that law is accessible easily to non-lawyers, experts in the field of computer and law are utilizing artificial human intelligence in new ways. **L.loevinger, "Jurimetrics: The Nest Step Forward" (1949) Minnesota Law Review 33 R.W. Morrison," Market Realities Of Rule-Based Software For Lawyers: Where The Rubber Meets The Road" (1989)** Language software, word processing software, accounting and other software, use artificial intelligence concepts currently. **ARVITA©** expands on these principles.

ARVITA© uses knowledge extracted from databases such as WESTLAW, LEXIS, ABANET, and CDB INFOTECK etc. **q.v.J.Bing (ed) Handbook Of Legal Information Retrieval (North-Holland, Amsterdam, 1984)** The software applies search and reasoning procedures to find solutions to problems and when it arrives at solutions, it provides justification for the answers it arrives at. It uses principles described in **El Rissland "Learning Row To Argue: Using Hypotheticals (1984).**

The principles set forth in HYPO which provide for conceptual retrievals based on the structure of legal arguments and fact patterns presented, are used in **ARVITA©.**

Ed Ashley "Toward a Computational Theory Of Arguing With Precedents: Accommodating Multiple Interpretations Of Cases (1989) El Rissland, "Examples In Legal Reasoning: Legal Hypotheticals" (1983) Proceedings First International Conference on Artificial

Intelligence and Law 67. Cases that are germane to the fact patterns and arguments are retrieved and arranged in terms of arguments presented and to be presented.

As commercial success is essential, **ARVITA©** prompts the user for information with questions that require a "yes""no" or "unknown"; queries and word patterns, thereby making it easier for the non-lawyer.

Traditionally, it is common for statutory interpretations to involve literal interpretations **C. Biagiolo, P. Mariani & D. Tiscornia "ESPLEX": A Rule And Conceptual Based Model For Representing Statutes" (1987).** On the other hand, case law requires a certain degree of interpreting. **ARVITA©** uses the Susskind model of eliminating "extraneous" data as well as "dicta" from cases. This is possible because cases are based on principles set forth in the law and rules, hence enabling ARVITA© to perform this function. **E. Levi, An Introduction To Legal Reasoning (University Of Chicago Press, Chicago) (1949) pp 3-5.** As fact patterns explain decisions that are rendered in cases, **ARVITA©** is able to achieve this task. **J.C. Smith and C. Deedman, "The Application Of Expert Systems Technology To Case-Based Reasoning (1987).** According to the report on technology assessment by the United States Department of Commerce, AHI also know as AI, could "1) help organizations manage knowledge assets and deal with complexity, 2) help experts solve difficult analysis problems and design new devices, 3) learn from examples, 4) provide answers to English questions using both structured data and free text.". Even though when the report

was issued the United States was far behind in areas such as neural networks, fuzzy logic, machine learning, robotics, etc, the United States Department of Commerce estimated that the global market for AHI or AI to be at about one billion dollars.

However, various researches believe that by 2007 the global market for AHI shall be between 20 to 30 billion dollars. Some specific AHI technologies are generally known as belief networks, agents, decision support systems, expert systems, neural networks which help existing applications in addressing variability. Researchers will continue to separate the fiction aspect of the field from industrial/commercial/business applications.

ARVITA© does exactly that. It hopes to be a major player in the legal field, adding services such as bulletin boards, message boards, e-mail, law journals etc as a part of the service.

For more information, you may contact Arrant: Kumar Tripati as (213) 653-5531 fax (213) 653-1272 or direct questions to Frederick A. Romero, Esq., Attorney At 8383 Wilshire Boulevard, Suite 516, Beverly Hills, California 90211, the General Counsel of Legal Research Associates.

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(2)

Supreme Court, U.S.
FILED
07-807 JUN 2 - 2007
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANANT KUMAR TRIPATI,
Petitioner,

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, GUNN McKAY; DEAN CHATFIELD; DONALD CONRAD; MARICOPA COUNTY ATTORNEY; COUNTY OF MARICOPA; TERRY BLAKE; RONALD HARRIS; DICK MESH; GERALD GRANT; RICHARD M. ROMLEY; TERESA ARCHULETA; VINCENT H. TOLINO; ESTATE OF TERESA ARCHULETA; ED KING; BETSEY BAYLESS; TOM RAWLES; DON STAPLEY; MARY ROSE WILCOX; DORA SCHRIRO, ADOC DIRECTOR; TERRY GODDARD ATTORNEY GENERAL ARIZONA; MICHAEL MUKASEY, ATTONEY GENERAL UNITED STATES
Respondents,

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME TWO OF THREE

ANANT KUMAR TRIPATI
P.O. BOX 70662,
PASADENA, CA 91117
(626)796-2231,
PETITIONER PRO PER

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IN THE UNITED STATES COURT
FOR THE DISTRICT OF ARIZONA

Anant Kumar Tripati,

Plaintiff,
vs.
Gunn McKay; Dean Chatfield; Terry Blake; Donald E. Conrad; Richard Mesh; Richard M. Romley; Ronald Harris; Vincent Tolino; Gerald Grant; Estate of Teresa Archuleta; Ed King; Betsey Bayless; Tom Rawles;
Don Stapley, Mary Rose Wilcox; and Maricopa County

Defendants.

No. CV 94-00170-ROS
JOINT PRETRIAL ORDER

THE PARTIES hereby submit their Joint Pretrial Order as follows:

A. TRIAL FOR THE PARTIES

Gunn McKay	
Deputy Maricopa Cty. Atty.	
Dean Chatfield	
Donald Conrad	
Maricopa County	
Ronald Harris	
Richard Mesh	
Richard M. Romley	
Maricopa Cty. Atty.	
Michael J. Frazelle, 602 274-4778	
Same	
Same	
Same	
Same	
Same	
Same	Same

9. Terry Blake Same
10.' Vincent H. Tolino Same
Deputy Maricopa Cty. Atty.
Estate of Teresa Archuleta Same
Paralegal for Maricopa Cty. Atty.
Ed King Same
Maricopa Cty. Supervisor
Betsey Bayless Same
Maricopa Cty. Supervisor
Tom Rawles Same
Maricopa Cty. Supervisor
Don Stapley Same
Maricopa Cty. Supervisor
Mary Rose Wilcox Same
.Maricopa Cty. Supervisor

B. STATEMENT OF JURISDICTION/ VENUE

Jurisdiction in this case is based on diversity of citizenship under Title 28 U.S.C. § 1332. Plaintiff alleges he is a citizen of Fiji and Defendants are all citizens of Arizona. The amount in controversy, exclusive of interest and costs, exceeds $75,000. Plaintiff contends Defendants acted under color of state law. Also, some California state law issues are involved.

Plaintiff brings his Federal civil rights claims under 42 U.S.C. §§ 1983 and § 1985(3)against Defendants in their individual and official capacities

C. NATURE OF THE ACTION

This is a civil rights case wherein Plaintiff seeks damages for Federal constitutional and statutory violations, as well as violations of California state law,

stemming out of Defendants' search and seizure of property at Plaintiff's place of business in California.

D. JURY TRIAL

The parties have demanded a jury trial.

E. CONTENTIONS OF THE PARTIES

1. PLAINTIFF'S CONTENTIONS: FIFTH AMENDED COMPLAINT CLAIMS REMAINING FOR TRIAL

The position taken by the Defendants is simple " We are law enforcement//public officials and as such, whatever we say is the truth, but what Tripati states is a lie, because, he is a convicted felon." However what they are arguing is a credibility issue and the jury should decide, who they believe. Plaintiff saw Dean Chatfield take the documents, ARVITA and the evidence that support Exh. 8. In 801(d)(2) statements, Teresa Archuleta stated that, Defendants will engage in the course of conduct set forth by Plaintiff. She also advised Plaintiff that she was asked to and did destroy the documents after Magistrate Judge Verkamp ordered they be produced.

Plaintiff by letter dated June 20, 2003 asked Mr. Michael Fraztlle to produce evidence as to each Count, and the evidence that form the basis of the testimony his witnesses will provide (see Plaintiff's Motion In Limine Re: June 20, 2003 Letter), but by letter dated June 27, 2003, Mr. Frazelle declined to produce the evidence. However, Defendants are basing their entire defense on the evidence that Mr. Frazelle refused to produce and that prior counsel refused to produce in spite of documents 87 and 95 and the mandatory provisions of Federal Rules. This is the same evidence

that support Exh. 8 and which Plaintiff saw Dean Chatfield take on June 24, 1992 and in Plaintiffs' presence.

As stated by Plaintiff in pp. 2 through 7 of his Joint Proposed Pretrial Order dated incorporated herein as though fully set forth, the 801(d) (2) statements support the claims made by Plaintiff.

Defendants entire argument "go to the credibility and the weight of the evidence" and this can only be decided by a jury.

"Civil rights actions often pit unsympathetic plaintiffs against the guardians of the community's safety. Geitz Lindsey, 893 F.2d. 148, 151 (7th Cir. 1990) , however, these guardians of the community's safety, like Defendants in this case, have been known to engage in the type of conduct alleged by plaintiff Bell v. City of Milwaukee, 746 F.2d 1205
(7th Cir. 1984).

As such, this Court should "totally disregard the statements by counsel. that their positions mean they are credible, that findings by Maricopa' County Superior Court judges should be given weight though not related to the subject matter of this Complaint."

This Court should keep in mind the recent Enron, Arthur Anderson, Worldcom and other high profile cases that have come in the media recently. All these cases have one common thread with this case. 'In all these cases, employees destroyed/ shredded evidence to cover-up. Here, this is exactly what has happened. And now Mr. Frazelle, by his June 27, 2003 letter has clearly decided, he shall and will not provide the evidence which relate to the subject matter of his witness testimonies. Why? The answer is simple. With the disclosure, Defendants will not be able to argue

what they state in this order. The evidence does 'not support them, so they have decided not to disclose them. They have decided to conceal evidence that is adverse to them - though relevant.

Defendants Tactics Should Be Enjoined

To confuse and prejudice the issues, to confuse and prejudice the Court, to confuse and prejudice the trial jury, Defendants are trying to "side step the issues before the Court" and argue the criminal convictions of the Plaintiff. They are inserting witnesses and irrelevant facts into this case, as is shown by Plaintiff in his version in this joint Pretrial Order. They are "inserting Plaintiff's criminal convictions, but want Plaintiff to be barred from inserting evidence, as a result of their insertion of Plaintiff's criminal convictions. They are arguing that they are honorable, truthful and honest but "they do not want Plaintiff to introduce evidence showing that they are dishonest, corrupt and engaged in the misconduct and have a pattern of engaging in such behavior." This Court should bar Defendants from "inserting Such matters and from taking the holier thin thou approach. They should not be allowed to insert issues and at the same time move to bar Plaintiff from showing that the issues they insert are not what they appear to be.

Equity, unclean hands, inherent power, Rules 11, 37 and the other related doctrines, should be utilized by this Court to enjoin such tactics.

As members of the bar, how can these lawyers, withhold evidence and argue everything is not supported? Their obligation is first to the Court and then to the Defendants.

This case was originally filed in 1993 and as of this date, counsel have not investigated the facts.

Counsel cannot give this Court a sworn statement that they have personally reviewed all executive minutes, disbursements, employment records, complaints and found them to be nonexistent. They cannot because they exist. See, Section E.1., pages 2 through 7, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003; which is incorporated herein as though fully .set forth.

A. Count One

See, Section E.1,, pages 7 through 9, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

B. Count Two

See, Section E.1., page 9, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

C. Count Three

See, Section E.1., pages 9 and 10, of Plaintiff's submission of Joint Proposed Pretrial Order dated, June 17, 2003, which is incorporated herein as though fully set forth.

D. Count Four

Plaintiff voluntarily dismissed Count Four at status conference on June 16, 2003.

E. Count Five

See, Section E.1., pages 10 and 11, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

F. Count Six

See, Section E.1., page 11, of Plaintiff's submission of Joint Proposed Pretrial Order dated June

17, 2003, which is incorporated herein as though fully set forth.

G. **Count Nine**

See, Section E.1., page 12, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

H. **Count Ten**

See, Section E.1., pages 12 through 13, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

I. **Count Fourteen**

See, Section E.1., page 14, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

J. **Count Sixteen**

See, Section E.1., pages 14 and 15, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

K. **Count Seventeen**

See, Section E.1., pages 15 and 16, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

L. **Count Nineteen**

See, Section E.1., pages 16 through 18, of Plaintiff's submission of Joint Proposed Pretrial Order. dated June 17, 2003, which is incorporated herein as though fully set forth.

M. **Count Twenty-One**

See, Section-E.1., pages 18 and 19, of Plaintiff's

submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

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N. Count Twenty-Four

See, Section E.1., pages 19 through 7, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

O. Count Twenty-Nine

See, Section E.1., pages 20 and 21, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

P. Count Thirty-One

See, Section E.1., page 21, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Q. Count Thirty-Seven

See, Section E.1., pages 21 and 22, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

R. Count forty-Three

See, Section E.1., pages 22 .and 23, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

2. DEFENDANTS CONTENTIONS

Plaintiff Anant Kumar Tripati ("Tripati"), previously convicted of committing bank fraud in Wyoming Federal District Court in 1983, was under

suspicion by the Maricopa County Attorney's Office of committing fraudulent schemes in Maricopa County, Arizona involving the forgery of various documents related to obtaining the bail and release of Eduardo Lopez and his brother, Rosario Lopez. The Lopez brothers were arrested by the Phoenix Police Department as the result of a lengthy undercover narcotics investigation. The Lopez brothers were indicted on November 4, 1991 on charges of leading organized crime; conspiracy to transport, import and sell narcotic drugs; sale of narcotic drugs; and other charges. Bond was set at $1,400,000 each.

Tripati's participation in this scheme involved misrepresentation of the value of certain property in or near Blythe, California, to be used as collateral for bail of the Lopez brothers. One of the Lopez brothers was actually rele4sed on one of the fraudulent bonds and fled to Mexico.

Based on the Maricopa County Attorney's Office investigation of Tripati's actions, two separate search warrants were issued for the search of Tripati's office in Beverly Hills, California.

Separate search warrants were issued out of both Arizona and California for the search of Tripati's office. The Arizona search Warrant was issued by the Honorable Ronald S. Reinstein, Judge of the Maricopa County Superior Court on June 23, 1992. Also, on June 23, 1992, Judge Candace J. Beason of the Municipal Court, Los Angeles Judicial District issued a search warrant no. 34227 authorizing the search of Tripati's business at 8484 Wilshire Boulevard, Suite 600, Beverly Hills, California.

On June 24, 1992, representatives of the Maricopa County Attorney's Office accompanied representatives of the Los Angeles County District Attorney's Office and served the search warrants at 8484 Wilshire Boulevard, Suite 600, Beverly Hills, California. Simultaneously with the service of the California search warrant, Tripati,was placed under arrest by the authority of the Los Angeles County District Attorney's Office representatives, who were also police officers in California and who were present and oversaw all aspects of the search of Tripati's office and his arrest. The items which were seized from Tripati's office consisted of thirty (30) distinct items and were impounded as evidence of tale crimes for which Tripati was charged in Arizona.

Mr. Tripati was booked at the West Hollywood Station and he fought extradition to Arizona. After a Governor's Warrant was obtained and served upon Mr. Tripati, he was extradited from California to Arizona and was booked at the Madison Street Jail on October 11, 1992.. Mr. Tripati was convicted by a jury of fraudulent schemes and artifices on July 16, 1993.

Defendants deny that any material, other than the material listed in the Evidence List, was ever taken from Tripati's place of business.

Defendants specifically deny seizing any items other than those listed, including software by the name of "ARVITA". Defendants also specifically deny that they had any other purpose or ulterior motive in searching Plaintiff's place of business other than to search for items believed to be used by Tripati in an on-going fraudulent scheme.

Defendants further state that the Maricopa County Attorney's Office does not have a policy, nor has

it ever had a policy, of "targeting" or singling out any minority group for prosecution. The Maricopa County Attorney's Office charges' individuals based on the standards set out in the Grand Jury. Charging Manual and in no way relies on a particular individual's race, sex, religion, or national origin in charging individuals with a crime.

Finally, 'the Maricopa County Board Of Supervisors has never fostered any "code of silence" or fostered a policy of paying punitive damages awards to encourage County employees to "target" any minority group for prosecution or engage in any illegal or improper activity.

Plaintiff has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief he is asserting. See, California Evidence Code, §500 (1995).

Wrongful Search And Seizure Claims:

[Counts One, Two and Three]

With respect to Plaintiff's claims arising out the alleged improper or "wrongful" search and seizure of his business premises and seizure of certain evidence, Defendants affirmatively state that they were acting pursuant to facially valid search warrants supported by probable cause. See, United States v. Sayakhom, 186 F.3d 928, 934-36 (9th Cir. 1999). Defendants further state that they were acting for a lawful and legitimate purpose, namely the investigation and prevention of criminal activity. See, *Case v. Kitsap County Sheriff's Dept.*, 249 F.3d 921 (9th Cir. 2001). Defendants have qualified and absolute immunity for Plaintiff's claims relating to the alleged wrongful seizure of his property. Further, Plaintiff has failed to provide any "specific,

nonconclusiory factual allegations" in support of his claims arising out any alleged wrongful search and seizure. See, Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001). Furthermore, Defendants McKay, Mesh,. Romley, Harris, and Archuleta had no active participation in the arrest, search and seizure and should not have to proceed to trial and defend against these claims.

Invasion Of Privacy Claims:

[Count Four]

Plaintiff voluntarily dismissed this claim at the status conference on June 16, 2003.

Abuse Of Process Claims:

[Counts Five and Six]

Plaintiff bears the burden of proving the essential elements of both his State and Federal abuse of process claims against these Defendants. Namely, Plaintiff must show that Defendants used legal process in a wrongful manner, not proper in the regular conduct of a proceeding, to accomplish a' purpose for which it was not designed and that the Defendant acted with an ulterior motive; that a willful act or threat was committed by Defendants not authorized by the process and not proper in the regular conduct of the proceedings; and finally, that the Defendants misuse of the legal process was a cause of injury, damages, loss or harm to Plaintiff. See, California Jury Instructions, Civil, •RAJI 7.70.

Plaintiff's Federal and California state claims for abuse of process must be dismissed as a matter of law because his- underlying conviction still stands. McArdle v. Tronetti, 9611 F.2d 1083 (3d Cir. 1992). Defendants have either qualified or absolute immunity to Plaintiff's abuse of process claims. See, Case v.

Ritsap County Sheriff's Dept., 249 F.3d 921 (9th Cir. 2001); Augustine v. McDonald, 770 F.2d 1442 (9°1 Cir. 1985). Further, Defendants were acting for a lawful purpose, namely the investigation and. prosecution of crime. Thus, the Defendants were justified in searching Plaintiff's business premises and seizing certain evidence in connection with fraudulent activities conducted by the Plaintiff in Arizona.

Tortious Theft Claim:

[Count Nine]

Tortious theft is a common law tort for which Plaintiff would bear the burden of proof as to each essential element of the cause of action. Plaintiff lacks sufficient evidence to prove the necessary elements of this cause of action. Defendants affirmative defenses to these claims consist of the fact that they were acting under facially valid search warrants which were issued with probable cause. Defendants were legally justified in searching Plaintiff's premises and legitimately seized certain property of Plaintiff used in connection with fraudulent schemes committed by Plaintiff. Defendants have qualified and absolute immunity from Plaintiff's tortious theft claim and all common law tort claims brought by Plaintiff: See, *Augustine v. McDonald,* 770 F.2d 1442 (9th Cir. 1985).

Furthermore, Defendants McKay, Mesh, Romley, and Archuleta had 'no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Plaintiff's Impairment To Business Goodwill;

Interference With Economic Advantage Claims:

[Counts Ten and Twenty-One]

Plaintiff bears the burden with respect to his claims for contractual interference and impairment of

business goodwill. California Jury Instructions, Civil, BAJI 7.80 16 CZ) generally. Defendants affirmatively state that they were not aware of any of Plaintiff's alleged contractual relations and further did not search Plaintiff's business premises or seize his property for any illegitimate purpose. Defendants pursuant to valid search warrants seized certain evidence from Plaintiff's business premises pursuant to an on-going criminal investigation.

Further, Plaintiff has failed to meet the "stigma plus" test set out in Paul v. Davis, 424 U.S. 693 (1976) and has failed to prove any of the factors considering whether the goodwill of a business has been impaired by any alleged actions of the Defendants. See, *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 374, 375 (9th Cir. 1999).

Additionally, Defendants McKay, Romley, Mesh, Archuleta, Tolino, and Grant had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Wrongful Extradition Claims:

[Counts Fourteen and Sixteen]

Defendants complied with both the Federal and California Extradition Acts. Plaintiff was a fugitive from justice as an arrest warrant was issued prior to his arrest in California. Plaintiff's arrest and extradition were entirely proper. *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986). Plaintiff fought extradition from California to Arizona. Plaintiff is responsible for any delay in his extradition from California to Arizona as such his claims pursuant to Gerstein should be dismissed.

Furthermore, Defendants Chatfield, McKay, Romley, Blake and Archuleta had no active participation in the extradition of the Plaintiff and should not have to proceed to trial and defend against these claims.

Equal Protection Claims:,

(Count Seventeen]

Plaintiff has admitted at his deposition that these Defendants did not target him because of his race. Because Plaintiff cannot show that his conviction had anything to do with his racial background, this claim should be dismissed. *See,, Johnson v. State of California*, 321 F.3d 791 (9th Cir. 2003.) Plaintiff must put forward .specific non-conclusory factual allegations that establish improper motive causing a cognizable injury. See, *Jeffers v. Gomez*, 267 F.3d 895 (Cir. 2001). Defendants specifically deny that they "targeted" or prosecuted Plaintiff due to his racial background and state that Plaintiff's place of business was searched and certain property of Plaintiff was, seized pursuant to valid search warrants and that this was performed for a legitimate purpose, namely investigating and prosecuting on-going criminal acts by Plaintiff in the State of Arizona.

Furthermore, Defendants Romley, Grant, Archuleta and McKay had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Due Process Violations Claims:

(Count Nineteen, including Counts Twenty-Two, Twenty- Eight, Thirty-Two and Thirty-Three]

The Plaintiff has the burden of proving one or more of the individually-named Defendants intentionally acted under color of law and caused a

deprivation of the Plaintiff's rights. (Ninth Circuit Model Civil Jury Instructions: 11.1.)

The Plaintiff has the burden of proving his rights were violated by an official policy of Maricopa County in order for municipal liability to attach. (Ninth Circuit Model Civil Jury Instructions: 11.12.) Also, the Plaintiff must prove that the policy actually caused a violation of his rights. (*City of Canton v. Harris, 489 U.S. 378, 395 (1989).) Maricopa County cannot have respondeat superior liability. (Monell v. Dept. of Social Services, 436 U.S. 658 (1978).)*

The Plaintiff does not have credible and admissible evidence in order to establish all of ,the elements of these claims. Additionally, the Defendants affirmatively state that no such policies, practices or procedures as alleged by the Plaintiff actually exist. No act/omission of any individual Defendant caused any violation of Mr. Tripati's rights. No official policy, practice or procedure of Maricopa County caused any violation of Mr. Tripati's rights.

Additionally, the Plaintiff has the burden of proving as to Defendant Romley that he was deliberately indifferent with respect to the implementation of official policies of the County Attorney's office or with respect to the alleged failure to promulgate certain policies which, in turn,. actually caused a violation of the Plaintiff's rights. *(L.W. vs. Grubbs, 145 F.3d. 1087, 1093 (9th Cir. 1996).)* The Plaintiff does not have credible and admissible evidence in this regard. No such policies or practices as alleged by the Plaintiff exist.

Furthermore, Defendants Grant, Romley, McKay, Mesh, Tolino and Archuleta had no active participation 'in the search and seizure and forfeiture and should not

have to proceed to trial or defend against Counts Nineteen, Twenty-Eight and Thirty-Two.

Interference With Prospective Business Relationships: *[Count Twenty-One]*

Plaintiff has the burden of proving the elements of his claims regarding interference with prospective business relationships and prospective economic advantage as set out in *Settimo Associates v. Environ Systems, Inc.*, 17 Cal. Rptr. 2d 757 (1993). •Defendants specifically deny that they were aware of Plaintiff's business relationships' and that the search of his business premises was performed subject to two (2) facially valid search warrants and that Defendants had a lawful purpose in searching Plaintiff's off in seizing certain property, namely the investigation and prosecution of criminal activities committed by Plaintiff in the State of Arizona.

Furthermore, Defendants McKay, Romley, Mesh, Archuleta, Tolino and Grant had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Breach Of Contract Claims Under California Law:

[Count Twenty-Four]

Defendants claim that any alleged .breach of contract claim Plaintiff may have did not arise under California law, but instead it arose in Arizona. Further, Defendants deny that; any contract existed. Defendants deny that any consideration existed for any contract alleged by Plaintiff. Defendants allege that it was impossible to perform on any contract alleged by Plaintiff and that any contract claimed by Plaintiff was void against public policy. Plaintiff bears the burden of

establishing that there was a contract and that the contract was breached by Defendants and that Plaintiff suffered damages therefrom.

Furthermore, none of the individually-named Defendants had any involvement in the alleged agreement which the Plaintiff claims was breached and they should not have to proceed to trial and defend against these claims.

Failure To Supervise Claim:

[Count Twenty-Seven]

The Plaintiff has the burden of proving that Defendant Romley was deliberately indifferent with respect to the supervision of his subordinates and that such a lack of supervision actually caused a violation of the Plaintiff's rights. *(LAT. vs. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996).)*

Mr. Romley cannot be held liable on a respondeat superior basis. (McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984).) Mere failure to control a subordinate is not a basis for imposing supervisory liability. (Rizzo v. Goode, 423 U.S.362 (1976).) The Plaintiff has no credible or admissible evidence in order to establish all of the elements of this claim. Mr. Romley denies the Plaintiff's claims and affirmatively alleges absolute and qualified immunity.

Denial Of Access To The Courts Claim:

[Count Twenty-Nine]

This claim is related to Plaintiff's breach of contract claim in that he has claimed that Defendants have denied him access to the courts by failing to produce certain discovery.

However, it is clear that Plaintiff is merely

attempting to attack his underlying conviction. This Count should be dismissed. Defendants specifically deny that they have in any way denied Plaintiff access to the courts. *See, Swekel v. City of River Rouge, 119 F.3d 1259, 1264 (6th Cir. 1997)* cert. denied 522 U.S. 1047 (1998).

Furthermore, none of the individually-named Defendants had any involvement in the alleged agreement which , the Plaintiff claims was breached and they should not have to proceed to trial and defend against these claims.

Retaliation Claim:

(Count Thirty-One]

Plaintiff must demonstrate genuine issues of material fact that Defendants engaged in a state action that was "designed to retaliate against and chill political expression." *See, Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002) (citing to, Gibson v. United States, 781 F.2d 1334, 1338_ (9thICir. 1986).* Defendants specifically deny that they in any way retaliated against Plaintiff, but instead were simply investigating criminal activities committed by the Plaintiff for which he was convicted.

Claims Under 61985(3):

(Count Thirty-Seven]

Plaintiff bears the burden of proving the essential elements of this claim, including the fact that he was discriminated against. Plaintiff has admitted that Defendants did not target him because of his race and, thus, this claim must be dismissed.

Defendants affirmatively state that they did not discriminate or target Plaintiff based on his racial background, but simply proceeded in a criminal-investigation related to Plaintiff's criminal activities in

the State of Arizona and acted under facially valid search warrants based on probable cause in their search of Plaintiff's office and subsequent seizure of certain property:

Trevino v. Gates Claims:

(Count Forty-Three)

Plaintiff has the burden of proof with respect to each and every essential element of his claim against the Maricopa County Board of Supervisors. Defendants affirmatively state that they have qualified and/or absolute immunity for Plaintiff's claims. Defendants further specifically deny that they have approved punitive damages awards in order to support or further any alleged wrongdoing by County employees. Plaintiff has failed to show or present any evidence that any action taken by the Board constituted a violation of his Constitutional rights. *See, Butler v. *Elie, 281 F.3d 1014 (9th Cir. 2002) (citing to, Sonoda v. Cabrera, 255 F.3d 1035, 1040 (9d1 Cir. 2001).*

Furthermore, the Plaintiff has not presented any evidence of approval of payment of punitive damages awards regardless of the reason for the approval.

Plaintiff's Claims For Damages:

Plaintiff has made numerous baseless claims for damages against these Defendants for a software program he alleges Defendants wrongfully seized from his business premises.

Plaintiff has the burden of proving compensatory damages in a §1983 case and the' amount of damages depends largely upon the credibility of Plaintiff's testimony concerning his injuries. See, Choate v. County of Orange, 103 Cal. Rptr. 2d 339 (Cal. App. 4th Dist. 2000). In the instant case, Plaintiff has utterly failed to produce or provide Defendants with any

specific credible factual evidence supporting his alleged claims for damages. Simply put, the Plaintiff cannot provide this Court or these Defendants with any credible proof of his alleged damages. Further, Maricopa County has absolute immunity, from punitive damages. *City of Newport v. East Concerts, 453 U.S. 247 (1981).*

F. STIPULATIONS AND UNDISPUTED FACTS

The parties are unable to come to any agreement as to stipulated and undisputed facts.

G. PLAINTIFF'S CONTENTIONS OF DISPUTED FACT

1. As probable cause was manufactured to obtain warrants the facial validity of the warrants do not matter. In his Complaint Plaintiff asserts there was no probable cause. If Defendants say they had probable cause, it was manufactured.

2. The premises were searched to close the business, forfeit the assets and both these unlawful purposes were attempted. However, this Plaintiff prevailed in the forfeiture.

3. All the items taken from the office were not listed on the inventory by Defendants.

4. Defendants seized the property to interfere with Plaintiff's prospective business relationships.

5. Plaintiff saw Dean Chatfield take the evidence and Teresa Archuleta confirmed she was asked to destroy them.

6. By 11-30-93'and 2-13-04 letters from the parties entered into contracts. For Jeffrey Alan Bernick and Michael Sullivan to enter into stipulations that made up documents 87 and 95, Plaintiff must have had to give up something. Why else would lawyers waive

objections and agree to pay all costs?

7. 801(d)92) statements by Archuleta and 801(d) (2) statements on the disks that Plaintiff saw Dean Chatfield taken; show Defendants target racial minorities for search and seizure and forfeiture. Their prosecution guidelines and policies are irrelevant.

8. As Defendants policies to prosecute are not at issue, their charging practices are irrelevant.

9. As during executive sessions members' of the Board of Supervisors, in bad faith, approve all punitive damages, they have by their practice caused the wrongs in the Complaint.

10. Plaintiff specifically saw Dean Chatfield remove ARVITA, the software copyright application, bids from vendors, Plaintiff's income statement, documents that support Exh. 8. However, he did not list these in his inventory and the warrant did not allow him to take these items.

11. Dean Chatfield, in the presence of the Plaintiff took documents that showed approval of punitive damages and facts set forth in Exh. 8 was prepared from handwritten notes taken by Plaintiff when he reviewed the complaints. This is why Plaintiff knows what they are.

12. Plaintiff will not do research for the Defendants. Defendants need to research the records of Maricopa County, executive minutes, records of disbursement record of complaints about employees. They should also note that all documents of the County are not automated. Had they complied with prior discovery requests and produced the information requested by Plaintiff in the June 20, 2003 letter, they would have found the complaints existence, punitive damages were

paid.

H. DEFENDANTS' CONTENTIONS OF DISPUTED FACT

1. A search of Plaintiff's business premises was pursuant to two (2) separate facially valid warrants based on probable cause.

2. There was no improper or ulterior motive behind the search of Plaintiff's business premises- and the search was conducted for a lawful purpose.

3. The only items taken from Plaintiff's place of business were those thirty (30) items listed in the Evidence List for Case No. 92-043.

4. Defendants did not arrest Plaintiff or seize his property to interfere with any alleged existing business relationships or any economic advantage Plaintiff may have had with other individuals or entities.

5. Defendants did not have any contractual relationship with Plaintiff and did not breach any contract with Plaintiff related to the production of certain discovery.

6. Defendants specifically deny that certain "evidence" exists which Plaintiff claims Defendants destroyed, including certain computer disks and tape recordings.

7. Defendants deny that they have any policy of targeting minorities for prosecution.

The Maricopa County Attorney's Office charges individuals with crimes on the basis of a "reasonable likelihood of conviction at trial" as stated in the 1989 Grand Jury Manual. This standard is more stringent than the "Probable Cause 'Only" standard of the American Bar Association.

9. The Maricopa County Board of Supervisor

Defendants deny that they have a policy and practice of paying punitive damage awards on behalf of County employees to encourage and further any policy to wrongfully prosecute or target minorities or for any other Improper purpose.

I. ISSUES OF LAW IN CONTROVERSY

A. Plaintiff

1. 'Defendants are not entitled to any immunity because they violated clearly established law. Burns v. Reed, 111 S.Ct. 1934 (1991); Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993).

These claims fall within Heck, fn. 7, as fully briefed. UCEA claims about the arrest are not Heck barred. Groman v. Township of ManalaPan, 47 F.3d. 628, 636 (3111 Cir. 1995). The claims on the search, seizure and forfeiture are not Heck barred as they fall within Heck, fn. 7. Likewise, the access to court claims are not Heck barred as they relate to destruction of evidence regarding this case.

There is no immunity for manufacturing probable cause. Greenstreet v. County of San Bernandino, 41 F.3d 1306, 1310 (9th Cir. 1994). Take. away the manufactured facts in the Chatfield' Affidavit - there is no probable cause and insufficient facts in the affidavit.

f4. On July 1, 1992 California courts allowed Defendants to take the property to Arizona. However, they took the property to Arizona on June 24, 1992. Hence, they are not immune as they had no right to the property on June 24, 1992. *Ross v. Neff, 905 F.2d. 1349 (10th Cir. 1990)*. Just 'like Ross, here Defendants had no right to take the property on June 24, 1992. Only on July 1, 1992 were Defendants given authority to take the property, As they took the property before July 1, 1992 they are not immune.

Plaintiff has dismissed the invasion of privacy claim. Under California law there is no common law immunity

7. The manner in which the warrant was executed in this case cannot be said to be objectively reasonable. Berquist v. Cochise County, 806 F.2d 1364 (9th Cir., 1996) because "reasonableness depends not only when a seizure was made but also how it was carried out" Tennessee v. Garner, 471 U.S. 1, 8 (1985). The warrants did not authorize Defendants to seize ARVITA as well as supporting documents for copyright; bids from vendors to acquire ARVITA; evidence of wrongdoing by Defendants regarding the subject matter set forth in Exh. 8, Plaintiff's business records etc.

Assuming for arguments sake, the Defendants were seizing evidence of a crime (which is false) they were still not Allowed to take the items above.

Likewise, Defendants were required to list all items they took, but they did not. Once again, this violates clearly established law.

Defendants have the burden of showing that they acted reasonably, that they listed all the items they took, that they did not take the items set forth above and in the Complaint Marks v. Clarke, 102 F.3d 1012, 1026-33 (9th Cir. 1996). Their reliance on a facially valid warrant does not shield them from liability Marks,- supra Lawmaster v. Ward, 125 F.3d. 1341, 1351 (10th Cir. 1997) Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989)(property taken on a warrant cannot be destroyed. officers liable).

Likewise, there is no prosecutorial immunity in these matters Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989) Kalina v. Fletcher, 18 S.Ct. 502 (1997).

Plaintiff's testimony is sufficient evidence. The jury has the duty to decide what weight and credibility it will give to the testimony. United States v.. Rickey, 917 F.2d 901, 904 (6th Cir. 1990).

Plaintiff's beliefs are not elements of equal protection but it is the Defendants "motivation" which is an element. 801(d)(2) statements by Archuleta are admissible evidence. She advised Tripati that race was a factor. Judge v. City of Lowell, 160 F.3d 67 (let Cir. 1998); Bell, infra.

In 1993 this action was filed in California. By a 11-3'0-93 and 2-13-94 letter the contract was entered and subsequently reaffirmed by counsel. Hence, California law applies.

Archuleta's statements are admissible evidence (see, 8 above). For 1985(3) Defendants motives are elements and what the Plaintiff believes is of no consequence. Bell v. Milwaukee, 746 F.2d • 1205 (7th Cir. 1984).

Improperly authorizing punitive damages in bad faith on a case by case basis subjects Defendants to liability; but for the conduct, there would have not been this complaint. Trevino v. Gates, 23 F.3d 1480 (9th Cir. 1994).

Plaintiff's testimony as to 801(d)(2) statements by Archuleta are not hearsay, even if she is dead. Savarese v. Agniss, 883 F.2d 1194, 1200, fn 9 (3td. Cir. 1989).

It is up to the jury to decide whether or not it believes the testimony of the Plaintiff on damages. United States v. Hickey, 917 F.2d 901, 904 (6th Cir. 1990).

What Defendants are saying is simple, they are law enforcement 'agents, so whatever they say is true,

but Plaintiff is a felon and prisoner, so everything he states is false. In essence they are saying, "Judge, trust us, we Won't lie to you. When we tell you Tripati is lying, he is lying. We never lie to you." However, this is exactly what the jury has to decide. Dean Chatfield took the documents, and they have been destroyed. So now, Defendants, are denying taking the materials and placing the integrity of the "positions they hold at issue". However, this is no reason for this Court to believe them over Plaintiff. The jury must decide this issue. Their entire argument in a nutshell is "Plaintiff is a liar but we as public officials are not lying."

B. Defendants

Defendants are entitled to qualified and absolute immunity from Plaintiff's claims. Imbler v. Pachtman, 424 U.S. 409(1976).

Plaintiff is challenging-his conviction under Heck V. Humphrey which requires dismissal of Plaintiff's claims.

3. Probable cause existed for the issuance of the warrants to search Plaintiff's place of business, thus, those officers executing the warrants justifiably relied on such warrants and are immune from suit. *Plaintiff cites Greenstreet v. County of San Bernadino, 41 F.3d 1306 (9th Cir. 1994)* to support his position that Defendants are not entitled to immunity, but Greenstreet only considered an officer's qualified immunity and not absolute immunity. Further, Greenstreet did not involve the "manufacturing" of evidence. The court simply held that there was not sufficient evidence presented in the affidavit to support probable cause.

4. The warrants issued for the search of Plaintiff's place of business were facially valid and, as such

provide qualified and/or absolute immunity to the Defendants. Plaintiff cites Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990), however, Ross involved the arrest of the plaintiff in Indian Country and did not involve the seizure of property. Qualified immunity was upheld by the court.

5. Defendants have either qualified or absolute immunity due to their status as prosecuting attorneys or investigators to Plaintiff's common law tort claims under: both Federal and California state law. See, Augustine v. McDonald, 770 F.2d 1442 (9th Cir. 1985); Turner v. Martire, 97 Cal.Rptr.2d 863 (2000)

6. Plaintiff does not have sufficient admissible evidence to prevail on his impairment of business goodwill or economic advantage claims.

Plaintiff has admitted at his deposit of that his racial background was not a factor in Defendants alleged prosecution of him, thus, his Equal Protection claims must be dismissed.

Plaintiff's alleged breach of contract claim does not arise under California-law and for that reason alone must be dismissed. Further, Plaintiff cannot prove the necessary elements of this claim.

Plaintiff's claims related to a "conspiracy° under §1985(3) must be dismissed because he has admitted that he was not targeted because of his racial background. Further, Plaintiff has not come forward with factually specific admissible evidence to support his conspiracy claim. See,. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th cir. 1988); Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989); Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989).

Plaintiff's Trevino v. Gates claims must be

dismissed because he has failed to establish some nexus between the Board approving the payment of punitive damages awards and some specific alleged injury to him.

Plaintiff has significant evidentiary burdens to overcome related to numerous documents and proposed testimony based on lack of foundation and relevance. Plaintiff's only evidence of a conspiracy or wrong doing by these Defendants is his own testimony and an alleged affidavit of Teresa allegedly based on conversations Plaintiff had with Teresa Archuleta, who is now deceased.. Plaintiff has not provided credible specific admissible evidence with respect to his claims for damages.

Defendants will address other specific legal deficiencies in the Motions In Limine being filed simultaneously with this proposed Joint Pretrial Order.

SEPARATE TRIAL OF ISSUES

Separate trial of any issue herein is neither advisable nor feasible.

WITNESSES.

Plaintiff's Witnesses

11. Following Witnesses Will. Be Called

Anant Kumar Tripati He will testify in accordance with the summary of his testimony set forth in his Joint Proposed Pretrial Order dated June 17, 2003.

ADOC Custodian. Will authenticate ADOC grievance records.

Fred Romero. Will testify as to Plaintiff's business operations, income,Arvita and the consequences of Defendants' actions upon the Plaintiff.

Vincent Tolino. Mr. Tolino will testify that Donald Conrad, Dean Chatfield and Vincent Tolino withheld from the Governors of Arizona and California -

violations of UCEA - because the disclosure would have adversely affected Defendants.

Dean Chatfield. Mr. Chatfield will testify he arrested Plaintiff on June. 24, 1992 and held him in custody. He will confirm he made the arrest prior to complying with UCEA and did not disclose this to the Governors.

Mr. Chatfield will confirm the arrest tape is authentic.

Mr. Chatfield will confirm he obtained the order from California Judge Candace Beason on July 1, 1992 to transport the property to Arizona but he, in fact, brought the property to Arizona on June 24, 1992.

Donald E. Conrad. Mr. Conrad will testify how he aided in manufacturing probable cause and obtained assistance from other Arizona agencies.

G. Richard K. Romley. Is the only witness who can testify as to his reasons for not investigating the complaints he reviewed for unlawful search and seizure, unlawful forfeiture, etc. There is no substitute for his testimony. He is the only one who can testify about the custom and tradition. No-one else, but Richard M. Romley can testify to the following facts:

Michael Cooke lodged a complaint about fabrication of probable cause to seize property, initiation of forfeiture in violation of the constitution, not listing all property taken. He reviewed the complaint and ordered no action be taken biased conduct, destruction of evidence, withholding material evidence. He reviewed the complaint and ordered no action be taken.

David Lamb lodged a complaint against Dean Chatfield for manufacturing probable cause, destroying items seized, not, listing all items seized. He reviewed the complaint and ordered no action be taken.

Alfredo Sanchez Garcia .lodged a complaint

against Gunn. McKay for creating probable cause, racially biased conduct, wrongful forfeiture. He reviewed the complaint and ordered no action be taken.

This is just an example of complaints (all of which are in Exh. 8) which Richard Romley reviewed, ordered no actions by taken, and covered up the misconduct.

Mr. .Romley did not promulgate any policies to prevent such acts not happen and he signed off on the complaints.

By letter dated June 27, 2003 Michael J. Frazelle Esq. declined regard. With the documents - his testimony may have been avoided. On June 24, 1992 Dean Chatfield took the documents.

H. Betsey Bayless. Betsey Bayless is the only one who can testify as to the reasons why during the executive sessions, she and other board members determined that punitive damage claims be paid, deciding the issue on a case by case basis. No-one but Betsey Bayless can testify to the following facts:

Complaint by Daniel Rodriguez E Spinoza was filed for wrongful seizure, wrongful forfeiture, manufacturing probable cause as well as racial profiling. Betsey Bayless authorized payment during executive sessions of the damages.

John Pacheco filed a complaint asserting items were stolen during search and seizure, not listed in the inventory, and items were destroyed by staff. Betsey Bayless during executive sessions reviewed the complaint and authorized payment.

Maureen. Heaton filed a complaint regarding abuse of process, during executive authorized damages.

There is no substitute for her testimony as no-one else can give the evidence.

By letter dated June 27, 2003 Michael J. Frazelle, Esq. declined to produce the executive session minutes. With the documents - her testimony may have been avoided. On June 24, 1992 Dean Chatfield took these minutes and documents.

2. Witnesses That May Be Called

These witnesses are not going to be called unless Defendants "open the door". Their relevant, except, if the door is opened.

Helen Maureen Jones. This witness SHALL AND WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. She will testify probable cause was manufactured and Plaintiff did not try to defraud her.

Roger Rudman. This witness SHALL AND WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. He will testify probable cause was manufactured and Plaintiff did not try to defraud him.

A. Melvin McDonald. This witness SHALL AND WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY

TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. He will testify that as counsel he knew Plaintiff did not defraud anyone and that probable cause was manufactured.

Robert Taugner. If Defendants argue forgery, this witness will testify that his affidavit is based on speculation and conjecture and is false and that one cannot say:, whether the documents are false or valid. He will testify about other similar complaints against him.

Judy Gabbert. If Defendants argue forgery, manufacture of evidence, she will testify, she got a call from Ronald Reinstein and after the date of that call, all documents created prior to that call by ADOC employees were changed. She will also confirm that she was unaware that her staff had given Plaintiff copies of prior documents, for had she been aware, the contents of documents after the call from Reinstein would not have changed. She will testify about other similar allegations against her.

Judge Ronald Reinsteln. If Defendants argue forgery or manufacture of evidence, he will testify as to how he called and had Judy Gabbert change documents. He will also testify about other similar allegations against him.

G. Judge Gregory H. Martin. If Defendants argue forgery, he will testify 'his order had no factual basis and was an accommodation to Judge Jonathan. Schwartz also other similar allegations against him.

Witnesses That Most Likely Will Not Be Called

Objections of Defendants To Plaintiff's Witnesses

Anant Kumar Tripati. The Defendants expect to object to many areas which Plaintiff has indicated that he may testify. Defendants expect to object to Plaintiff's

testimony on the basis of relevancy, lack of foundation and personal knowledge, hearsay, and prejudice.

ADOC Custodian. Defendants object to this witness being called on the basis that the subject records are not relevant and are prejudicial due to the fact that they would tend to confuse the jury as to what issues are really in controversy.

Fred Romero. Defendants object on the basis of relevance, lack of foundation, and prejudice.

Vincent Tolino. Defendants have no objection to this witness.

1.E. Dean Chatfield. Defendants have no objection to this witness.

1.F. Donald E. Conrad., Defendants have no objection to this witness.

1.G. Richard AL Romley. Defendants object on the basis that Mr. Romley was not involved in the alleged search of Plaintiff's business premises or the seizure of his property. Further, other witnesses can testify as to any alleged practices and procedures of Maricopa County. Mr. Romley is a prominent public official and Plaintiff's only purpose in calling him is to harass these Defendants.

Plaintiff claims that only Mr. Romley can testify regarding certain complaints filed by various individuals, however, defense counsel has searched Maricopa County Superior Court database and found no claims for these listed individuals. Simply put, there is no evidence that these individuals ever existed much less filed complaints against any of the Defendants. Plaintiff is once again "manufacturing" evidence in an attempt to get what he wants.

1.H. Betsey Bayless. Defendants object on the basis that Ms. Bayless was in no way, involved in the search

of Plaintiff's business or the seizure of his property nor has the Plaintiff produced any credible and admissible evidence that she has approved the payment of any punitive damages awards - regardless of the reason or motivation for such approval. Plaintiff's sole purpose in-attempting to call Ms. Bayless is to harass these Defendants.

Ms. Bayless has never approved the payment of punitive damages in connection with her service on the Maricopa County Board of Supervisor. Plaintiff has no other evidence than the names he supposedly "remembers" from pleadings the "scanned". Interestingly, Plaintiff can allegedly remember the names of all the individuals listed in Plaintiff's Exh. 8 but cannot remember a cause number or any other specific information about the other individuals who allegedly filed claims. Plaintiff does not 'have sufficient evidence to proceed with any claim against Defendant Bayless and his naming her is for purposes of harassment only.

2.A. Helen Maureen Jones. The. Defendants object to Plaintiff calling Helen Maureen Jones and her expected testimony. Plaintiff claims that Ms. Jones will testify that probable cause was manufactured. Plaintiff does not claim in his Fifth Amended Complaint that Defendants manufactured evidence - this is a new claim presented by Plaintiff.

Further, the testimony that Plaintiff expects to elicit from Ms. Jones goes to the validity of his underlying conviction. The testimony is barred pursuant to Heck v. Humphrey. Defendants further object on the basis of relevancy, foundation and prejudice.

Roger Rudman. Defendants object to this witness on

the basis that the expected testimony is not relevant, lacks foundation, is prejudicial, and goes to Plaintiff's underlying conviction.

A. Melvin McDonald. Defendants object to this witness on the basis that the expected testimony is not relevant, lacks foundation, is prejudicial, and goes to Plaintiff's underlying conviction.

Robert Taugner. Defendants have no objection to this witness.

Judge Gregory H. Martin. No objection.

Defendants' Witnesses

1. Following Witnesses Will Be Called

A. Dean C. Chatfield, Criminal Investigator (retired) with Maricopa County Attorney's Office. 'Mr. Chatfield will testify with respect to his investigation of Tripati and his obtaining search- warrants for his place of business and seizure of items related to Tripati's suspected fraudulent activities in Arizona.

Mr. Chatfield will provide testimony with respect to his conversations with law enforcement officials in Los Angeles, California in order to obtain a California search warrant for Plaintiff's place of business.

Mr. Chatfield is expected to testify regarding the arrest of Tripati, as well as the search of Tripati's business and what specific items were seized from the business premises.

.B. Donald E. Conrad, formerly Maricopa County Attorney.

Mr. Conrad is expected to testify regarding his traveling with Dean' Chatfield, Investigator Terry Blake, Phoenix Police Detective Joe Soto to Los Angeles, California where they met Investigators Rich Goldston and Gary Judge of the Los Angeles County

Attorney's Office. Mr. Conrad is expected to testify regarding the search of Plaintiff's business and as to what items were actually seized during the search. He is also expected to testify with respect to Mr. Tripati's arrest at his place of business. Further, he is expected to testify with respect to his prosecution of the State's case against Mr. Tripati.

C. Terry Blake, Phoenix Police Department Investigator.

Mr. Blake is expected to testify regarding his involvement in the investigation of Tripati and the search of Tripati's place of business and what items were seized during that. search

Department.

Mr. Soto is expected to testify regarding his involvement in the investigation of Mr. Tripati and his involvement in the search of Tripati's place of business and what items were specifically seized from the business.

Vincent H. Tolino. Maricopa County Attorney's Office.

Mr. Tolino will testify to his involvement in obtaining a Governor's Warrant for the extradition of Tripati from California to Arizona for prosecution.

Detective Nate Jackson, Maricopa County Sheriff's Office.

Detective Jackson is expected to testify as to his involvement in obtaining a Governor's Warrant and extradition of Tripati from California to Arizona.

G. Ronald F. Harris, Final County Attorney's Office.

Mr. Harris, formerly of the Maricopa County Attorney's Office, is expected to testify as to what property was actually seized from Tripati's place of

business. He is further expected to testify that this property was subject to forfeiture due to its use in criminal activities by Mr. Tripati and for no other reason. Mr. Harris is also expected to testify that he had no conversations with any other attorneys or employees of Maricopa County regarding prosecuting Mr. Tripati because of his race sex, religion, they state in this order.The evidence does not support them, so they have decided not to disclose them. They have decided to conceal evidence that is adverse to them - though relevant.

Defendants Tactics Should Be Enjoined

To confuse and prejudice the issues, to confuse and prejudice the Court, to confuse and prejudice the trial jury, Defendants are trying to "side step the issues before the Court" and argue the criminal convictions of the Plaintiff. They are inserting witnesses and irrelevant facts into this case, as is" shown by Plaintiff in his version in this Joint Pretrial Order. They are "inserting Plaintiff's criminal convictions, but want Plaintiff to be barred from inserting evidence, as a result of their insertion of Plaintiff's criminal convictions. They are arguing that they are honorable, truthful and honest but "they do not want Plaintiff to introduce evidence showing that they are dishonest, corrupt and engaged in the misconduct and have a pattern of engaging in such behavior." This Court should bar Defendants from "inserting such matters and from taking the holier thin thou approach. They should not be allowed to insert issues and at the same time move to bar Plaintiff from showing that the issues they insert are not what they appear to be.

Equity, unclean hands, inherent power, Rules 11, 37 and the other related doctrines, should be

utilized b this Court to enjoin such tactics.

As members of the bar, how can these lawyers, withhold evidence and argue everything is not supported? Their obligation is first to the Court and then to the Defendants.

This case was originally filed in 1993 and as of this date, counsel have not investigated the facts. Counsel cannot give this Court a sworn statement that they have personally reviewed all executive minutes, disbursements, employment records, complaints and found them to be nonexistent. They cannot because they exist.

See, Section E.1., pages 2 through 7, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003; which is incorporated herein as though fully set forth.

Count One

See, Section E.1.-, pages 7 through 9, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Two

See, Section E.1., page 9, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Three

See, Section E.1., pages 9 and 10, of Plaintiff's Order dated; June 17, 2003, which is incorporated herein as though fully set forth.

Count Four

Plaintiff voluntarily dismissed Count Four at status conference on June 16, 2003.

Count Five

See, Section EA.., pages 10 and 11, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Six

See, Section E.1., page 11, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Nine

See, Section E.1., page 12, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporate*Ted, herein as though fully set forth.

Count Ten •

See, Section E.1., pages 12 through 13, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Fourteen

See, Section E.1., page 14, of Plaintiff's submission of Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Sixteen

See, Section E.1., pages 14 and 15, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Seventeen

See, Section E.1., pages 15 and 16, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Nineteen

See, Section E..1., pages 16 through 18, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Twenty-One

See, Section E.1., pages 18 and 19, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Twenty-Four

See, Section E.1., pages 19 through 7, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Twenty-Nine

See, Section .E.1., pages 20 and 21, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Thirty-One

See, Section E.1., page 21, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Thirty-Seven

See, Section E.1., pages 21 and 22, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

Count Forty-Three

See, Section E.1., pages 22 .and 23, of Plaintiff's submission of Joint Proposed Pretrial Order dated June 17, 2003, which is incorporated herein as though fully set forth.

2. DEFENDANTS' CONTENTIONS

Plaintiff Anant Kumar Tripati ("Tripati"), previously convicted of committing bank fraud in Wyoming Federal District Court in 1983, was under suspicion by the Maricopa County Attorney's Office of committing fraudulent schemes in Maricopa County, Arizona involving the forgery of various documents related to obtaining the bail and release of Eduardo Lopez and his brother, Rosario Lopez. The Lopez brothers were arrested by the Phoenix Police Department as the result of a lengthy undercover narcotics investigation.

The Lopez brothers were indicted on November 4, 1991 on charges of leading organized crime; conspiracy to transport, import and sell narcotic drugs; sale of narcotic drugs; and other charges. Bond was set at $1,400,000 each Tripati's participation in this scheme involved misrepresentation of the value of certain property in or near Blythe, California, to be used as collateral for bail of the Lopez brothers. One of the Lopez brothers was actually rele4.sed on one of the fraudulent bonds and fled to Mexico.

Based .on the Maricopa County Attorney's Office investigation of Tripati's actions, two separate search warrants were issued for the search of Tripati's office in Beverly Hills, California.

Separate search warrants were issued out of both Arizona and California for the search of Tripati's office. The Arizona search warrant was issued by the Honorable Ronald S. Reinstein, Judge of the Maricopa County Superior Court on June 23, 1992. Also, on June 23, 1992, Judge Candace J. Beason of the Municipal Court, Los Angeles Judicial District issued a search warrant no. 34227 authorizing the search of Tripati's

business at 8484 Wilshire Boulevard, Suite 600, Beverly Hills, California.

On June 24, 1992, representatives of the Maricopa County Attorney's Office accompanied representatives of the Los Angeles County District Attorney's Office and served the search warrants at 8484 Wilshire Boulevard, Suite 600, Beverly Hills, California. Simultaneously with the service of the California search warrant, Tripati,was placed under arrest by the authority of the Los Angeles County District Attorney's Office representatives, who were also police officers in California and who were present and oversaw all aspects of the search of Tripati's office and his arrest. The items which were seized from Tripati's office consisted of thirty (30) distinct items and were impounded as evidence of the crimes for which Tripati was charged. in Arizona.

Mr. Tripati was booked at the West Hollywood Station and he fought extradition to Arizona. After a Governor's Warrant was obtained and served upon Mr. Tripati, he was extradited from California to Arizona and was booked at the Madison Street Jail on October 11, 1992.. Mr. Tripati was convicted by a jury of fraudulent schemes and artifices on July 16, 1993.

Defendants deny hat any material, other than the material listed in the Evidence List, was ever taken from Tripati's place of business.

Defendants specifically deny seizing any items other than those listed, including software by the name of "ARVITA".

Defendants also specifically deny that they any other purpose or ulterior motive in searching Plaintiff's place of business other than to search for items

believed to be used by Tripati in an on-going fraudulent scheme.

Defendants further state that the Maricopa County Attorney's Office does not have a policy, nor has it ever had a policy, of "targeting" or singling out any minority group for prosecution. The Maricopa County Attorney's Office charges' individuals based on the standards set out in the Grand Jury. Charging Manual and in no way relies on a particular individual's race, sex, religion, or national origin in charging individuals with a crime.

Finally, 'the Maricopa County Board Of Supervisors has never fostered any "code of silence" or fostered a policy of paying punitive damages awards to encourage County employees to "target" any minority group for prosecution or engage in any illegal or improper activity.

Plaintiff has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief he is asserting. See, California Evidence Code, §500 (1995).

Wrongful Search And Seizure Claims:

[Counts One, • Two and Three]

With respect to Plaintiff's claims arising out the alleged improper or "wrongful" search and seizure of his business premises and seizure of certain evidence, Defendants affirmatively state that they were acting pursuant to facially valid search warrants supported by probable cause. See, United States v. Sayakhom, 186 F.3d 928, 934-36 (9th Cir.
1999). Defendants further state that they were acting for a lawful and legitimate purpose, namely the investigation and prevention of criminal activity. See, Case v. Kitsap County Sheriff's Dept.; 249 F.3d 921

(9th Cir. 2001). Defendants have qualified and absolute immunity for Plaintiff's claims relating to the alleged wrongful seizure of his property.

Further, Plaintiff has failed to provide any "specific, nonconclusiory factual allegations" in support of his claims arising out any alleged wrongful search and seizure. See, Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001).

Furthermore, Defendants McKay, Mesh, Romley, Harris, and Archuleta had no active participation in the arrest, search and seizure and should not have to proceed to trial and defend against these claims.

Invasion Of Privacy Claims:

[Count Four]

Plaintiff voluntarily dismissed this claim at the status conference on June 16, 2003.

Abuse Of Process Claims:

[Counts Five and Six]

Plaintiff bears the burden of proving the essential elements of both his State and Federal abuse of process claims against these Defendants. Namely, Plaintiff must show that Defendants used legal process in a wrongful manner, not proper in the regular conduct of a proceeding, to accomplish a' purpose for which it was not designed and that the Defendant acted with an ulterior motive; that a willful act or threat was committed by Defendants not authorized by the process and not proper in the regular conduct of the proceedings; and finally, that the Defendants misuse of the legal process was a cause of injury, damages, loss or harm to Plaintiff. See, California Jury Instructions, Civil, •BAJI 7.70.

Plaintiff's Federal and California state claims for abuse of process must be dismissed as a matter of law

because his-underlying conviction still stands. McArdle v. Tronetti, 9611 F.2d 1083 (3d Cir. 1992).

Defendants have either qualified or absolute immunity to Plaintiff's abuse of process claims. See, Case v. Kitsap County Sheriff's Dept., 249 F.3d 921 (9th Cir. 2001); Augustine v. McDonald, 770 F.2d 1442 (9th Cir. 1985). Further, Defendants were acting for a lawful purpose, namely the investigation and. prosecution of crime. Thus, the Defendants were justified in searching Plaintiff's business premises and seizing certain evidence in connection with fraudulent activities conducted by the Plaintiff in Arizona.

Furthermore, Defendants McKay, Mesh, Romley, and Archuleta had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defendant against these claims.

Tortious Theft Claim:

[Count Nine]

Tortious theft is a common law tort for which Plaintiff would bear the burden of proof as to each essential element of the cause of action. Plaintiff lacks sufficient evidence to prove the necessary elements of this cause of action. Defendants affirmative defenses to these claims consist of the fact that they were acting under facially valid search warrants which were, issued with probable cause. Defendants were legally justified in searching Plaintiff's premises and legitimately seized certain property of Plaintiff used in connection with fraudulent schemes committed by Plaintiff. Defendants have qualified and absolute immunity from Plaintiff's tortious theft claim and all common law tort claims brought-by Plaintiff. See, Augustine v. McDonald, 770 F.2d 1442 (9th ci r 1985).

Furthermore, Defendants McKay, Mesh, Romley,

and Archuleta had 'no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Plaintiff's Impairment To Business Goodwill; Interference With Economic Advantage C/aims:

[Counts Ten and Twenty-One]

Plaintiff bears the burden with respect to his claims for contractual interference and impairment of business goodwill generally. Defendants affirmatively state that they were not aware of any of Plaintiff's alleged contractual relations and further did not search Plaintiff's business premises or seize his property for any illegitimate purpose. Defendants pursuant to valid search warrants seized certain evidence from Plaintiff's business premises pursuant to an on-going criminal investigation.

Further, Plaintiff has failed to meet the "stigma plus" test set out in Paul v. Davis, 424 U.S. 693 (1976) and has failed to prove any of the factors considering whether the goodwill of a business has been impaired by any alleged actions of the Defendants. See, WMK Technologies, Inc. v. Milltr, 197 F.3d 367, 374, 375 (9th Cir. 1999).

Additionally, Defendants McKay, Romley, Mesh, Archuleta, Tolino, and Grant had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Wrongful Extradition Claims: [Counts Fourteen and Sixteen]

Defendants complied with both the Federal and California Extradition Acts. Plaintiff was a fugitive from justice as an arrest warrant was issued prior to

his arrest in California. Plaintiff's arrest and extradition were entirely proper. *Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986).*

Plaintiff fought extradition froth California to Arizona from California to Arizona as such his claims pursuant to Gerstein should be dismissed.

Furthermore, Defendants Chatfield, McKay, Romley, Blake and Archuleta had no active participation in the extradition of the Plaintiff and should not. have to proceed to trial and defend against these claims.

Equal Protection Claims:, [Count Seventeen]

Plaintiff has admitted at his deposition that these Defendants did not target him because of his race. Because Plaintiff cannot show that his conviction had anything to do with his racial background, this claim should be dismissed.

See„ Johnson v. State of California, 321 F.3d 791 (9th Cir. 2003.) Plaintiff must put forward .specific non-conclusory factual allegations that establish improper motive causing a cognizable injury. See, Jeffers v. Gomez,. 267 F.3d 895 (9th Cir. 2001).

Defendants specifically deny that they "targeted" or prosecuted Plaintiff due to his racial background and state that Plaintiff's place of business was searched and certain property of Plaintiff was seized pursuant to valid search warrants and that this was performed for a legitimate purpose, namely investigating and prosecuting on-going criminal acts by Plaintiff in the State of Arizona.

Furthermore, Defendants Romley, Grant, Archuleta and McKay had no active participation in the search and seizure and forfeiture and should not

have to proceed to trial and defend against these claims.

Due Process Violations Claims:
[Count Nineteen, including Counts Twenty-Two, Twenty. Eight, Thirty-Two and Thirty-Three]

The Plaintiff has the burden of proving one or more of the individually-named Defendants intentionally acted under color of law and caused a deprivation of the Plaintiff's rights. (Ninth Circuit Model Civil Jury Instructions: 11.1.)

The Plaintiff has the burden of proving his rights were violated by an official policy of Maricopa County in order for municipal liability to attach. (Ninth Circuit Model Civil. Jury Instructions: 11.12.)

Also, the Plaintiff must prove that the policy actually caused a violation of his rights. (City of Canton v. Harris, 489 U.S. 378, 395 (1989).) Maricopa County cannot have respondeat superior liability. (Monell v. Dept. of Social Services, 436 U.S. 658 (1978).)

The Plaintiff does not have credible and admissible evidence in order to establish all of .the elements of these claims. Additionally, the Defendants affirmatively state that no such policies, practices or procedures as alleged by the Plaintiff actually exist.No act/omission of any individual Defendant caused any violation of Mr. Tripati's rights. No official policy, practice or procedure of Maricopa County caused any violation of Mr. Tripati's rights.

Additionally, the Plaintiff has the burden of proving as to Defendant Romley that he was deliberately indifferent with respect to the implementation of official policies of the County Attorney's office or with respect to the alleged failure to

promulgate certain policies which, in turn, actually caused a violation of the Plaintiff's rights. (L.W. vs. Grubbs, 145 F.3d. 1087, 1093 (9th Cir. 1996).) The Plaintiff does not have credible and admissible evidence in this regard. No such policies or practices as alleged by the Plaintiff exist.

Furthermore, Defendants Grant, Romley, McKay, Mesh, Tolino and Archuleta had no active participation 'in the search and seizure and forfeiture and should not have to proceed to trial or defend against Counts Nineteen, Twenty-Eight and Thirty-Two.

Interference With Prospective Business Relationships:
[Count Twenty-One]

Plaintiff has the burden of proving the .elements of his claims regarding interference with prospective business relationships and prospective economic advantage as set out in Settimo Associates v. Environ Systems, Inc., 17 Cal. Rptr. 2d 757 (1993). Defendants specifically deny that they were aware of Plaintiff's business relationships and that the search of his business premises was performed subject to two certain property, namely the investigation and prosecution of criminal activities committed by Plaintiff in the State of Arizona.

Furthermore, Defendants McKay, Romley, Mesh, Archuleta, Tolino and Grant 'had no active participation in the search and seizure and forfeiture and should not have to proceed to trial and defend against these claims.

Breach Of Contract' Claims Under California Law:
[Count Twenty-Four]

Defendants claim that any alleged 'breach of contract claim Plaintiff may have did not arise under California law, but instead it arose in Arizona. Further, Defendants deny that any contract existed. Defendants deny that any consideration existed for any contract alleged by Plaintiff. Defendants allege that it was impossible to perform on any contract alleged by Plaintiff and that any contract claimed by Plaintiff was void against public policy. Plaintiff bears the burden of establishing that there was a contract and that the contract was breached by Defendants and that Plaintiff suffered damages therefrom.

Furthermore, none of the individually-named Defendants had any involvement in the alleged agreement which the Plaintiff claims was breached and they should not have to proceed to trial and defend against these claims.

Failure To Supervise Claim:
[Count Twenty-Seven]

The Plaintiff has the burden of proving that Defendant Romley was deliberately indifferent with respect to the supervision of his subordinates and that such a lack of supervision actually caused a violation of the Plaintiff's rights. (L.W. vs. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996).) Mr. Romley cannot be held liable on a respondeat superior basis. (McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984).) Mere failure to control a subordinate is not a basis for imposing supervisory liability. (Rizzo v. Goode, 423 U.S. 362 (1976).)

The Plaintiff has no credible or admissible evidence in order to establish all of the elements of this claim. Mr. Romley denies the Plaintiff's claims and affirmatively alleges absolute and qualified immunity.

Denial Of Access To The Courts Claim:
[Count Twenty-Nine]

This claim is related to Plaintiff's breach of contract claim in that he has claimed that Defendants have denied him access to the courts by failing to produce certain discovery.

However, it is clear that Plaintiff is merely attempting to attack his underlying conviction. This Count should be dismissed. Defendants specifically deny that they have in any way denied Plaintiff access to the courts. See, Swekel v. City of River Rouge, 119 F.3d 1259, 1264 (6th Cir. 1997) Cert: denied 522 U.S. 1047 (1998)..

Furthermore, none of the individually-named Defendants had any involvement in the alleged agreement which the Plaintiff claims was breached and they should not have to proceed to trial and defend against these claims.

Retaliation Claim:
[Count Thirty-One]

Plaintiff must demonstrate genuine issues f material fact that Defendants engaged in a state action that was "designed to retaliate against and hill political expression." See, Butler v. Elle, 281 F.3d 1014 (9th Cir. 202) (citing to, Gibson v. United States, 781 F.2d 1334, 1338. (9th1Cir. 1986).. Defendants specifically deny that they in any way retaliated against Plaintiff, but instead were simply investigating criminal activities committed by the Plaintiff for which he was convicted.

Claims Under §1985(3):
[Count Thirty-Seven]

Plaintiff bears the burden of proving the essential elements of this claim, including the fact that

he was discriminated against. Plaintiff has admitted that Defendants did not target him because of his race and, thus, this claim must be dismissed.

Defendants affirmatively state that they did not discriminate or target Plaintiff based on his racial background, but simply proceeded in a criminal investigation related to Plaintiff's criminal activities in the State of Arizona and acted under facially valid search warrants based on probable cause in their search of Plaintiff's office and subsequent seizure of certain property.

Trevino v. Gates Claims:
(Count Forty-Three]

Plaintiff has the burden of proof with respect to each and every essential element of his claim against the Maricopa County Board of Supervisors. Defendants affirmatively state that they have qualified and/or absolute immunity for Plaintiff's claims. Defendants further specifically deny that they have approved punitive damages awards in order to support or further any alleged wrongdoing by County employees. Plaintiff has failed to show or present any evidence that any action taken by the Board constituted a violation of his Constitutional rights. See, Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002)(citing to, Sonoda v. Cabrera, 255 F.3d 1035, 1040 (9th Cir. 2001). Furthermore, the Plaintiff has not presented any evidence of approval of payment of punitive damages awards regardless of the reason for the approval.

Plaintiff's Claims For Damages:

Plaintiff has made numerous baseless claims for damages against these Defendants for a software program he alleges Defendants wrongfully seized from his business premises.

Plaintiff has the burden of proving compensatory damages, in a §1983 case and the • amount of damages depends largely upon the credibility of Plaintiff's testimony concerning his injuries. See, Choate v. County of Orange, 103 Cal. Rptr. 2d 339 (Cal. App. 4th Dist. 2000). In the instant case, Plaintiff has utterly failed to produce or provide Defendants with any specific credible factual evidence supporting his alleged claims for damages. Simply put, the Plaintiff cannot provide this Court or these Defendants with any credible proof of his alleged damages. Further, Maricopa County has absolute immunity, from punitive damages. City of Newport v. East Concerts, 453 U.S. 247 (1981).

STIPULATIONS AND UNDISPUTED FACTS

The parties are unable to come to any agreement as to stipulated and undisputed facts.

PLAINTIFF'S CONTENTIONS OF DISPUTED FACT

As probable cause was manufactured to obtain warrants the facial validity of the warrants do not matter. In his Complaint Plaintiff asserts there was no probable cause. If Defendants say they had probable cause, it was manufactured.

The premises were searched to close the business, forfeit the assets and both these unlawful purposes were attempted.However, this Plaintiff prevailed in the forfeiture.

3. All the items taken from the office were not listed on the inventory by Defendants.

Defendants seized the property to interfere with Plaintiff's prospective business relationships.

Plaintiff saw Dean Chatfield take the evidence and

Teresa Archuleta confirmed she was asked to destroy them. By 11-30-93 ' and 2-13-04 letters from the parties entered into contracts. For Jeffrey Alan Bernick and Michael Sullivan to enter into stipulations that made up documents 87 and 95, Plaintiff must have had to give up something. Why else would lawyers waive objections and agree to pay all costs? 801(d)92) statements by Archuleta and 801(d) (2) statements on the disks that Plaintiff saw Dean Chatfield take; show Defendants target racial minorities for search and seizure and forfeiture. Their prosecution guidelines and policies are irrelevant.

As Defendants policies to prosecute are not at issue, their charging practices are irrelevant.

As during executive sessions members' of the Board of Supervisors, in bad faith, approve all punitive damages, they have by their practice caused the wrongs in the Complaint.

10. Plaintiff specifically saw Dean Chatfield remove ARVITA, the software copyright' application, bids from vendors, Plaintiff's income statement, documents that support Exh. 8. However, he did not list these in his inventory and the warrant did not allow him to take these items.

11. Dean Chatfield, in the presence of the Plaintiff took documents that showed approval of punitive damages and facts set forth in Exh. 8. Exh. 8 was prepared from handwritten notes taken by Plaintiff when he reviewed the complaints. This is why Plaintiff knows what they are.

12. Plaintiff will not do research for the Defendants. Defendants need to research the records of Maricopa County, executive minutes, records of disbursements(record of complaints about employees.

They should also note that all documents of the County are not automated. Had they complied with prior discovery requests and produced the information requested by Plaintiff in the June 20, 2003 letter, they would have found the complaints existence, punitive damages were paid.

H. DEFENDANTS' CONTENTIONS OF DISPUTED FACT

A search of Plaintiff's business premises was pursuant to two (2) separate facially valid warrants based on probable cause.

There was no improper or ulterior motive behind the search of Plaintiff's business premises and the search was conducted for a lawful purpose.

The only items taken from Plaintiff's place of business were those thirty (30) items listed in the Evidence List for Case No. 92-043.

Defendants did not arrest Plaintiff or seize his property to interfere with any alleged existing business relationships or any economic advantage Plaintiff may have had with other individuals or entities.

Defendants did not have any contractual relationship with Plaintiff and did not breach any contract with Plaintiff related to the production of certain discovery.

Defendants specifically deny that certain "evidence" exists which Plaintiff claims Defendants destroyed, including certain computer disks and tape recordings.

Defendants deny that they have any policy of targeting minorities for prosecution.

The Maricopa County Attorney's Office charges individuals with crimes on the basis of a "reasonable likelihood of conviction at trial" as stated in the 1989

grand jury manualThis standard is more stringent than the "Probable Cause 'Only" standard of the American Bar Association.

9. ' The Maricopa County Board of Supervisor Defendants deny that they have a policy and practice of paying punitive damage awards on behalf of County employees to encourage and further any policy to wrongfully prosecute or target minorities or for any other improper purpose.

I. ISSUES OF LAW IN CONTROVERSY

A. Plaintiff

1. Defendants arc not entitled to any immunity because they violated clearly established law. Burns v. Reed, 111 S.Ct. 1934 (1991); Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993). These claims fall within Heck, fn. 7, as fully briefed. UCEA claims about the arrest are not Heck barred. Groman.v. Township of Manalapan, 47 F.3d. 628, 636 (31."1 Cir. 1995). The claims on the search, seizure and forfeiture are not Heck barred as they fall within Heck, fn. 7. Likewise, the access to court claims are not Heck barred as they relate to destruction of evidence regarding this case.

There is no immunity for manufacturing probable cause. Greenstreet v. County of San Bernandino, 41 F.3d 1306, 1310 (9th Cir. 1994). Take. away the manufactured facts in the Chatfield' Affidavit - there is no probable cause and insufficient facts in the affidavit.

14. On July 1, 1992 California courts allowed Defendants to take the property to Arizona. However, they took the property to Arizona on June 24, 1992. Hence, they are not immune as they had no right to the property on June 24, 1992. Ross v. Neff, 905 F.2d. 1349. (10th Cir. 1990). Just 'like Ross, here

Defendants had no right to take 'the property on June 24, 1992. Only on July 1, 1992 were Defendants given authority to take the property. As they took the property before July 1, 1992 they are not immune.

Plaintiff has dismissed the invasion of privacy claim. Under California law there is no common law immunity

7. The manner in which the warrant was executed in this case cannot be said to be objectively reasonable. Berquist v. Cochise County, 806 F.2d 1364 (9th Cir., 1996) because "reasonableness depends not only when a seizure was made but also how it was carried out" Tennessee v. Garner, 471 U.S. 1, 8 (1985). The warrants did not authorize Defendants to seize ARVITA as well as supporting documents for copyright; bids from vendors to acquire ARVITA; evidence of wrongdoing by Defendants regarding the subject matter set forth in Exh. 8, Plaintiff's business records etc.

Assuming for arguments sake, the Defendants were seizing evidence of a crime (which is false) they were still not Allowed to take the items above.

Likewise, Defendants were required to list all items they took, but they did not. Once again, this violates clearly established law.

Defendants have the burden of showing that they acted reasonably, that they listed all the items they took, that they did not take the items set forth above and in the Complaint Marks v. Clarke, 102 F.3d 1012, 1026-33 (9th Cir. 1996). Their reliance on a facially valid warrant does not shield them from liability Marks, supra Lawmaster v. Ward, 125 F.3d. 1341, 1351 (10th Cir. 1997) Ginter v. Stalicup, 869

F.2d 384 (8th Cir. 1989)(property taken on a warrant cannot be destroyed. officers liable).

Likewise, there is no prosecutorial immunity in these (9th matters Gobel V. Maricopa County, 867 F.2d 1201 Cir. 1989) Kalina v. Fletcher, 18 S.Ct. 502 (1997).

Plaintiff's testimony is sufficient evidence. The jury has the duty to decide what weight and credibility it will give to the testimony. United States v., Hickey, 917 F.2d 901, 904 (6th Cir. 1990).

Plaintiff's beliefs are not elements of equal protection but it is the Defendants "motivation" which is an element. 801(d)(2) statements by Archulcta are admissible evidence. She advised Tripati that race was a factor. Judge v. City of Lowell, 160 F.3d 67 (18t Cir. 1998); Bell, infra.

In 1993 this action was filed in California. 'By a 11-Z0-93 and 2-13-94 letter the contract was entered and subsequently. reaffirmed by counsel. Hence, California law applies.

Archuleta's statements are admissible evidence (see, 8 above). For 1985(3) Defendants motives are elements and what the Plaintiff believes is of no consequence. Bell v. Milwaukee, 746 F.2d. 1205 (7th Cir. 1984).

Improperly authorizing punitive damages in bad faith on a case by case basis subjects Defendants to liability; but for the conduct, there would have not been this complaint. Trevino v. Gates, 23 F.3d 1480 (9th Cir. 1994).

Plaintiff's testimony as to 801(d)(2) statements by Archuleta are not hearsay, even if she is dead. Savarese v. Agniss, 883 F.2d 1194, 1200, fn 9 (3rd Cir. 1989).

It is up to the jury to decide whether or not it

believes the testimony of the Plaintiff on damages. United States v. Hickey, 917 F.2d 901, 904 (6th Cir. 1990).

What Defendants are saying is simple, they are law enforcement 'agents, so whatever they say is true, but Plaintiff is a felon and prisoner, so everything he states is false. In essence they are saying, "Judge, trust us, we won't lie to you. When we tell you Tripati is lying, he is lying. We never lie to you." However, this is exactly what the jury has to decide. Dean Chatfield took the documents, and they have been destroyed. So now, Defendants, are denying taking the materials and placing the integrity of the "positions they hold at issue". However, this is no reason for this Court to believe them over Plaintiff. The jury must decide this issue. Their entire argument in a nutshell is "Plaintiff is a liar but we as public officials are not lying."

B. Defendants

Defendants are entitled to qualified and absolute immunity from Plaintiff's claims. Imbler v. Pachtman, 424 U.S. 409 (1976).

Plaintiff is challenging' his conviction under Heck v. Humphrey which requires dismissal of Plaintiff's claims.

3. Probable cause existed for the issuance of the warrants to search Plaintiff's place of business, thus, those officers executing the warrants justifiably relie on such warrants and are immune from suit. Plaintiff cites Greenstreet v. County of San Bernadino, 41 F.3d 1306 (9" Cir. 1994) to support his position that Defendants are not entitled to immunity, but Greenstreet only considered an officer's qualified immunity and not absolute immunity. Further,

Greenstreet did not involve the "manufacturing" of evidence. The court simply held that there was not sufficient evidence presented in the affidavit to support probable cause.

The warrants issued for the search of Plaintiff's place of business were facially valid and, as such, provide qualified and/or absolute immunity to the Defendants.

Plaintiff cites Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990), however, Ross involved the arrest of the plaintiff in Indian Country and did not involve the seizure of property. Qualified immunity was upheld by the court.

Defendants have either qualified or absolute immunity due to their status as prosecuting attorneys or investigators to Plaintiff's common law tort claims under both Federal and California state law. See, Augustine v. (9th McDonald, 770 F.2d 1442 (^Cir. 1985); Turner v. Martire, 97 Cal.Rptr.2d 863 (2000) does not have sufficient admissible to prevail on his impairment of business goodwill or advantage claims.

Plaintiff has admitted at his deposition that his racial background was not a factor in Defendants alleged prosecution of him, thus, his Equal Protection claims must be dismissed.

Plaintiff's alleged breach of contract claim does not arise under California law and for that reason alone must be dismissed. Further, Plaintiff cannot prove the necessary elements of this claim.

Plaintiff's claims related to a "conspiracy" under §1985(3) must be dismissed because he has admitted that he was not targeted because of his racial background. Further, Plaintiff has not come forward with factually specific admissible evidence to support his conspiracy claim. See, Karlm-Panahi v. Los Angeles

Police Dept., 839 F.2d 621, 626
(9th cir. 1988); Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989); Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989).

Plaintiff's Trevino v. Gates claims must be dismissed because he has failed to establish some nexus between the Board approving the payment of punitive damages awards and some specific alleged injury to him.

Plaintiff has significant evidentiary burdens to overcome related to numerous documents and proposed testimony based on lack of foundation and relevance. Plaintiff's only evidence of a conspiracy or wrong doing by these Defendants is his own testimony and an alleged affidavit of Teresa allegedly based on conversations Plaintiff had with Teresa Archuleta, who is now deceased..

Plaintiff has not provided credible specific admissible evidence with respect to his claims for damages.

Defendants will address other specific legal deficiencies in the Motions . In Limine being filed simultaneously with this proposed Joint Pretrial Order.

SEPARATE TRIAL OF ISSUES

Separate trial of any issue herein is neither advisable nor feasible.

WITNESSES.

Plaintiff's Witnesses

11. Following Witnesses Will. Be Called

Anant Kumar Tripati He will testify in accordance with the summary of his testimony set forth in his Joint Proposed Pretrial Order dated June 17, 2003.

ADOC Custodian. Will authenticate ADOC grievance records.

Fred Romero. Will testify as to Plaintiff's business operations, income,Arvita and the consequences of Defendants' actions upon the Plaintiff.

Vincent Tolino. Mr. Tolino will testify that Donald Conrad, Dean Chatfield and Vincent Tolino withheld from the Governors of Arizona and California - violations of UCEA - because the disclosure would have adversely affected Defendants.

Dean Chatfield. Mr. Chatfield will testify he arrested Plaintiff on June. 24, 1992 and held him in custody. He will confirm he made the arrest prior to complying with UCEA and did not disclose this to the Governors.

Mr. Chatfield will confirm the arrest tape is authentic.

Mr. Chatfield will confirm he obtained the order from California Judge Candace Beason on July 1, 1992 to transport the property to Arizona but he, in fact, brought the property to Arizona on June 24, 1992.

Donald E. Conrad. Mr. Conrad will testify how he aided in manufacturing probable cause and obtained assistance from other Arizona agencies.

G. Richard K. Romley. Is the only witness who can testify as to his reasons for not investigating the complaints he reviewed for unlawful search and seizure, unlawful forfeiture, etc. There is no substitute for his testimony. He is the only one who can testify about the custom and tradition. No-one else, but Richard M. Romley can testify to the following facts:

Michael Cooke lodged a complaint about fabrication of probable cause to seize property, initiation of forfeiture in violation of the constitution, not listing all property taken. He reviewed the complaint and ordered no action be taken biased conduct, destruction of evidence, withholding material evidence. He reviewed the complaint and ordered no

action be taken.

David Lamb lodged a complaint against Dean Chatfield for manufacturing probable cause, destroying items seized, not, listing all items seized. He reviewed the complaint and ordered no action be taken.

Alfredo Sanchez Garcia .lodged a complaint against Gunn. McKay for creating probable cause, racially biased conduct, wrongful forfeiture. He reviewed the complaint and ordered no action be taken.

This is just an example of complaints (all of which are in Exh. 8) which Richard Romley reviewed, ordered no actions by taken, and covered up the misconduct.

Mr. .Romley did not promulgate any policies to prevent such acts not happen and he signed off on the complaints.

By letter dated June 27, 2003 Michael J. Frazelle Esq. declined regard. With the documents - his testimony may have been avoided. On June 24, 1992 Dean Chatfield took the documents.

H. Betsey Bayless. Betsey Bayless is the only one who can testify as to the reasons why during the executive sessions, she and other board members determined that punitive damage claims be paid, deciding the issue on a case by case basis. No-one but Betsey Bayless can testify to the following facts:

Complaint by Daniel Rodriguez E Spinoza was filed for wrongful seizure, wrongful forfeiture, manufacturing probable cause as well as racial profiling. Betsey Bayless authorized payment during executive sessions of the damages.

John Pacheco filed a complaint asserting items were stolen during search and seizure, not listed in the inventory, and items were destroyed by staff. Betsey

Bayless during executive sessions reviewed the complaint and authorized payment.

Maureen. Heaton filed a complaint regarding abuse of process, during executive authorized damages.

There is no substitute for her testimony as no-one else can give the evidence.

By letter dated June 27, 2003 Michael J. Frazelle, Esq. declined to produce the executive session minutes. With the documents - her testimony may have been avoided. On June 24, 1992 Dean Chatfield took these minutes and documents.

2. Witnesses That May Be Called

These witnesses are not going to be called unless Defendants "open the door". Their relevant, except, if the door is opened.

Helen Maureen Jones. This witness SHALL AND WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. She will testify probable cause was manufactured and Plaintiff did not try to defraud her.

Roger Rudman. This witness SHALL AND WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. He will testify probable cause was manufactured and Plaintiff did not try to defraud him.

A. Melvin McDonald. This witness SHALL AND

WILL NOT BE CALLED, UNLESS AND UNTIL, DEFENDANTS, ARGUE PROBABLE CAUSE, ARGUE PLAINTIFF DEFRAUDED OR TRIED TO DEFRAUD THE WITNESSES, AS THE BASIS FOR PROBABLE CAUSE AND/OR IF DEFENDANTS TRY TO BRING UP PLAINTIFF'S CRIMINAL CONVICTIONS. He will testify that as counsel he knew Plaintiff did not defraud anyone and that probable cause was manufactured.

Robert Taugner. If Defendants argue forgery, this witness will testify that his affidavit is based on speculation and conjecture and is false and that one cannot say:, whether the documents are false or valid. He will testify about other similar complaints against him.

Judy Gabbert. If Defendants argue forgery, manufacture of evidence, she will testify, she got a call from Ronald Reinstein and after the date of that call, all documents created prior to that call by ADOC employees were changed. She will also confirm that she was unaware that her staff had given Plaintiff copies of prior documents, for had she been aware, the contents of documents after the call from Reinstein would not have changed. She will testify about other similar allegations against her.

Judge Ronald Reinsteln. If Defendants argue forgery or manufacture of evidence, he will testify as to how he called and had Judy Gabbert change documents. He will also testify about other similar allegations against him.

G. Judge Gregory H. Martin. If Defendants argue forgery, he will testify 'his order had no factual basis and was an accommodation to Judge Jonathan. Schwartz also other similar allegations against him.

Witnesses That Most Likely Will Not Be Called

Objections of Defendants To Plaintiff's Witnesses

Anant Kumar Tripati. The Defendants expect to object to many areas which Plaintiff has indicated that he may testify. Defendants expect to object to Plaintiff's testimony on the basis of relevancy, lack of foundation and personal knowledge, hearsay, and prejudice.

ADOC Custodian. Defendants object to this witness being called on the basis that the subject records are not relevant and are prejudicial due to the fact that they would tend to confuse the jury as to what issues are really in controversy.

Fred Romero. Defendants object on the basis of relevance, lack of foundation, and prejudice.

Vincent Tolino. Defendants have no objection to this witness.

1.E. Dean Chatfield. Defendants have no objection to this witness.

1.F. Donald E. Conrad., Defendants have no objection to this witness.

1.G. Richard AL Romley. Defendants object on the basis that Mr. Romley was not involved in the alleged search of Plaintiff's business premises or the seizure of his property. Further, other witnesses can testify as to any alleged practices and procedures of Maricopa County. Mr. Romley is a prominent public official and Plaintiff's only purpose in calling him is to harass these Defendants.

Plaintiff claims that only Mr. Romley can testify regarding certain complaints filed by various individuals, however, defense counsel has searched Maricopa County Superior Court database and found no claims for these listed individuals. Simply put, there is no evidence that these individuals ever

existed much less filed complaints against any of the Defendants. Plaintiff is once again "manufacturing" evidence in an attempt to get what he wants.

1.H. Betsey Bayless. Defendants object on the basis that Ms. Bayless was in no way, involved in the search of Plaintiff's business or the seizure of his property nor has the Plaintiff produced any credible and admissible evidence that she has approved the payment of any punitive damages awards - regardless of the reason or motivation for such approval. Plaintiff's sole purpose in-attempting to call Ms. Bayless is to harass these Defendants.

Ms. Bayless has never approved the payment of punitive damages in connection with her service on the Maricopa County Board of Supervisor. Plaintiff has no other evidence than the names he supposedly "remembers" from pleadings the "scanned". Interestingly, Plaintiff can allegedly remember the names of all the individuals listed in Plaintiff's Exh. 8 but cannot remember a cause number or any other specific information about the other individuals who allegedly filed claims. Plaintiff does not 'have sufficient evidence to proceed with any claim against Defendant Bayless and his naming her is for purposes of harassment only.

2.A. Helen Maureen Jones. The. Defendants object to Plaintiff calling Helen Maureen Jones and her expected testimony. Plaintiff claims that Ms. Jones will testify that probable cause was manufactured. Plaintiff does not claim in his Fifth Amended Complaint that Defendants manufactured evidence - this is a new claim presented by Plaintiff.

Further, the testimony that Plaintiff expects to elicit from Ms. Jones goes to the validity of his

underlying conviction. The testimony is barred pursuant to Heck v. Humphrey. Defendants further object on the basis of relevancy, foundation and prejudice.

Roger Rudman. Defendants object to this witness on the basis that the expected testimony is not relevant, lacks foundation, is prejudicial, and goes to Plaintiff's underlying conviction.

A. Melvin McDonald. Defendants object to this witness on the basis that the expected testimony is not relevant, lacks foundation, is prejudicial, and goes to Plaintiff's underlying conviction.

Robert Taugner. Defendants have no objection to this witness.

Judge Gregory H. Martin. No objection.

Defendants' Witnesses

1. Following Witnesses Will Be Called

A. Dean C. Chatfield, Criminal Investigator (retired) with Maricopa County Attorney's Office. 'Mr. Chatfield will testify with respect to his investigation of Tripati and his obtaining search- warrants for his place of business and seizure of items related to Tripati's suspected fraudulent activities in Arizona.

Mr. Chatfield will provide testimony with respect to his conversations with law enforcement officials in Los Angeles, California in order to obtain a California search warrant for Plaintiff's place of business.

Mr. Chatfield is expected to testify regarding the arrest of Tripati, as well as the search of Tripati's business and what specific items were seized from the business premises.

.B. Donald E. Conrad, formerly Maricopa County Attorney.

Mr. Conrad is expected to testify regarding his traveling with Dean' Chatfield, Investigator Terry Blake, Phoenix Police Detective Joe Soto to Los Angeles, California where they met Investigators Rich Goldston and Gary Judge of the Los Angeles County Attorney's Office. Mr. Conrad is expected to testify regarding the search of Plaintiff's business and as to what items were actually seized during the search. He is also expected to testify with respect to Mr. Tripati's arrest at his place of business. Further, he is expected to testify with respect to his prosecution of the State's case against Mr. Tripati.

C. Terry Blake, Phoenix Police Department Investigator.

Mr. Blake is expected to testify regarding his involvement in the investigation of Tripati and the search of Tripati's place of business and what items were seized during that. search

Department.

Mr. Soto is expected to testify regarding his involvement in the investigation of Mr. Tripati and his involvement in the search of Tripati's place of business and what items were specifically seized from the business.

Vincent H. Tolino. Maricopa County Attorney's Office.

Mr. Tolino will testify to his involvement in obtaining a Governor's Warrant for the extradition of Tripati from California to Arizona for prosecution.

Detective Nate Jackson, Maricopa County Sheriff's Office.

Detective Jackson is expected to testify as to his involvement in obtaining a Governor's Warrant and extradition of Tripati from California to Arizona.

G. Ronald F. Harris, Final County Attorney's Office.

Mr. Harris, formerly of the Maricopa County Attorney's Office, is expected to testify as to what property was actually seized from Tripati's place of business. He is further expected to testify that this property was subject to forfeiture due to its use in criminal activities by Mr. Tripati and for no other reason. Mr. Harris is also expected to testify that he had no conversations with any other attorneys or employees of Maricopa County regarding prosecuting Mr. Tripati because of his race sex, religion, they state in this order.The evidence does not support them, so they have decided not to disclose them. They have decided to conceal evidence that is adverse to them - though relevant.

EXPERTS

No experts were retained by Plaintiff EXHIBITS
Plaintiff
Affidavit of Plaintiff
Fifth Amended Complaint
Letter from MCAO
Archuleta interview
June 16, 1993 memo
March 17, 1994 Order 7.
April 6, 1994 Order
404-406 Evidence
Supplemental affidavit
Supplemental affidavit
Return to warrant
Return to warrant
Report
Arrest warrant
Complaint

Correspondence
Affidavit with letter
Floor plan
Goldston declaration 720. Goldston declaration
January 16, 1993 letter
January 12, 1993 letter
January 21, 1993 letter
January 24, 1993 letter
February 5, 1993 letter
February 26, 1993 letter
January 19, 1993 letter
March 4, 1993 letter
Racketeering lien
Complaint
Chatfield affidavit.
Harris affidavit
33. May 10, 1994 letter
February 22, 1994 Order
May 18, 1994 Order
Release form
Inmate contraband/property release
Grievance
Grievance
March 5, 1993 Order
January 25, 1994 Order
April 5, 1994 Order
September 19, 1994 Order
December 12, 1994 letter [error: 12-22-94]
February 19, 1995 memo: [error: 02-09-95]
p46. February- 9, 1995 memo [Error: Order vacating cease and desist .(02-09-95)]
Affidavit
Warrant request
July 12, 1993 letter

January 18, 20.00 memo
November 24, 1999 memo
Affidavit
Information report
Letter [error: Surety's, bonds)
Discovery
Archuleta affidavit
Interview tapes
Arrest tape
Taugner declaration
Arvita
Martin Order
Sultan affidavit
Guy affidavit
Opening
June 20, 2003 letter
June 27, 2003 response

Objections To Plaintiff's Exhibits By Defendants

1. Affidavit of Plaintiff:- Duplicative; relevance; hearsay; foundation; undue prejudice outweighs probative value.
2. Fifth Amended Complaint: 403 F.R.E.; not all of Plaintiff's Counts are still viable; relevance; undue prejudice outweighs probative value.
3. Letter from MCAO and handwritten notes: 901, 1002 F.R.E.; hearsay; foundation.
4. Archuleta interview: 106, 805, 901, 1002 F.R.E.; Dead Man Statute; foundation; hearsay.
5. June 16, 1993 memo: 805, 901, 1002 F.R.E.; Dead Man or national origin.

SEPARATE TRIAL OF THE :SSUES

Separate trial of the issues in this case is not feasible.

WITNESSES

Witnesses Who Shall Be called

By Plaintiff

Plaintiff shall call the following witnesses at the trial:

1. Anant Kumar Tripati: Anent Kumar Tripati shall testify as follows: otwz..0

'1. I am a citizen of the Fiji Islands and have initiated

this litigation against Gunn McKay, Dean Chatfield, Terry Blake, Donald E. Conrad, Richard Mesh, Richard M. Romley, Ronald Harris, Vincent Tolino, Gerald Granit Teresa Archuleta, Ed King, .Betsey Bayless, Tom Rawlei, Don Stapley, Mary' Rose Wilcox and Maricopa County. •

These defendants and each of them are all citizens of the State Of Arizona who have acted as agents of Maricopa County. under color of State Law and have been sued by me in their individual as•well as their official capacities inspite of the fact that I have previously been convicted, I, until my. arrest on June 24th, .1992 owned and operated Legal Research Associates, a National Litigation. Support firm which Was, operated out of 8484 Wilshire Boulevard, Suite 600, in-Beverly Hills, California:90211, Exhibit 18 is the floor plan of my office as it existed on June 14th, 1992 the date Of the arrest and search and. seizure.

4. I provided litigation support to lawyers, outside legal counsel for cities such as. the City Of Phoenix, Mesa, Tempe and other: legal as well: as public entities.'

5, Ai a litigation support firm research sid complicated controversial issues, drafted documents. for lawyers, hired .experts and made certain, the lawyers had, enough time for the courtroom as well as-fully prepared to represent his/her client. I did not go to court. We had over 65 lawyers, paralegals and investigators—who worked on a contract basis. Our firm was extensively written .about in various papers and we were in the process of providing additional services.

I had a client base of in excess of 7,000 lawyers and an annual income of in excess of $1,500,000.

During the course of my providing assistance to my clients on controversial issues, I obtained documentary evidence which supports the facts that I have set forth in this affidavit. In particular, the entities I assisted gave me the materials and I also had investigators, former employees of Maricopa County, off duty police officers, conduct investigations for and on. my behalf; and acquire the materials which I reviewed and found supported the facts in this affidavit.

8. Once I obtained documents, I personally read ma reviewed each and every document and personally scanned them. on dicks

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9. I personally observed defendant Dean Chatfield on June 24, 1992 remove these disks from my office, at which time he was aimed with his service weapons.

I also observed Dean Chatfield remove audio tapes and these tapes had details of my conversations with Teresa Archuleta regarding my research and finding supported by documentary evidence which I obtained from employees of the Maricopa County Attorney's Office and 'others associated with Maricopa County. Since September 21, 1993 I have tried to take depositions of Teresa-Archuleta so as to have her statements on the record but have been prevented by lawyers for Teresa Archuleta and defendants in this case, from taking these depositions, though they had agreed.

11. Teresa Archuleta and I bad. one of other discussions on March 27, 1992 at length regarding the policies and practices of Maricopa County to target the racial minority and disadvantaged for law enforcement activities. She confirmed the existence of such practices

and sent me documents which farther supported my findings. I took the documents, reviewed them, scanned and stored them on the d4 1e which Dean. Chatfield, I saw, took on lime 24,1992 from my office and in my presence.

I had the policy of taping all conversations that involved me. Dean Chatfield, on June 24th,1992, I saw, took all these tapes. The tapes of my conversations with Teresa Archuleta show that she warned me that Dean Chatfield, Richard Mesh and Gunn McKay were targeting me as a direct result of my challenging the conduct of Maricopa County. That tape also shows that she advised me had I not been an East Indian, they would not have targeted me. During my conversations that are on that tape, she told me that if I backed off, nothing would happen to me.

I had further discussions with Teresa Archuleta on August 18, 1992, at which time, she informed me that had I listened to her, I would not be in custody.

Lawyers for defendants by documents 87 and 95 agreed to give me all these materials but they Dave yet to .give these to me. ; Documents I had obtained from employees of Maricopa County and Maricopa... . County Attorney's Office show that Maricopa County Attorney's Office and Mari. cepa County have had the long staining operating procedure to target racial minorities like me for arrest, for prosecution. These records also show that they also have the long standing practice and proceeded to target property owned by racial minorities for seizure and forfeiture:

16. I am an East Indian, and a racial minority. I was in fact challenging the practice and procedures of Maricopa County, Maricopa County Attorney's Office and in particular Richard M. Rowley,

Gtmn McKay, Dean, Chatfield, Teresa Archuleta, Richard mesh to target for arrest and prosecution and to forfeit property owned by racial minorities. To be more specific, about 85 people mostly Mexicans were arrested and their property were being forfeited by defendants. White's in greater part , with a great deal of money, were not targeted and were let go.
I was helping challenge the practice on behalf of the Mcdcans.
17. Documents that I had obtained during the process from Teresa Archuleta and other employees of Maricopa County and Maricopa County Attorney's Office, were scanned by me on computer disks. I personally observed Dean Chatfield take the disks from my office on June 4,1992. These documents showed that when an employee is hired to work by Maricopa County and the Maricopa County Attorney's Office, that employee becomes aware that "nobody's perfect" and that the only way that employee can protect himself / herself from his / her own mistakes, is to protect other employees. Based on my understanding I know that this concept is what is traditionally called the "no rat" rule. If this rule is violated, the person involved receives swift but silent disapproval. The practice is never to do anything which might embarrass another . employ, of Maricopa a County or Maricopa County Attorney.

L8. These documents showed that to draw critical attention to Another employee is a' taboo. The documents reflect the fact that it is demanded that employees cover uP the mistake of . mother employee further *showing that while complaints from the public are felt to be avoidable, fellow employees go to great

lengths to see that public complaints are ruled to be unfounded and without any basis./

19. Richard Mesh and Gerald Grant according to these documents play critical roles in this regards. They screen all complaints, in their capacity as supervisory staff: They then manufacture whatever needs to be manufacture, to make certain that the wrong that the employee of Maricopa County and Maricopa County Attorney' s Office committed is covered up. As apart of the cover-up they, according to the documents, offer a citizen, especially a racial minority, the chance to either plead guilty or to settle the forfeiture action. these documents also showed. That when racial minorities declined to settle, they used the complete resources of Maricopa County and Maricopa County Attorney's Office to fight the case to the hilt. Racial minorities like me, as evidenced by the documents, do to lack of money, give-up and put up with the misconduct spending years in prison. I am spending 52.5 years just because of this practice.

20. According to the documents, in Maricopa County it is the unwritten policy that no employee is to lodge a complaint against another employee and no employee is to testify against another employee. This is traditionally known as the code of silence and it does more than prevent testimony. It 'mandates that no officer report another for misconduct, that supervisory officers not discipline other officers for misconduct, and that any and all investigations against employees be discouraged. Based on my experience, I can state without any degree of hesitancy, that this practice is so insidious and dangerous, as defendants use their extraordinary power over the lives of others. As the documents I had scanned onto disks showed this

practice and as I was in the process of challenging this practice, Dean Chatfield, in my presence took the documents:

21. I was in my office On June 24th, 1992 and personally observed Dean 'Chatfield removed my property. he was armed so I was unable to resist him. Dean Chatfield told me he :was acting under the authority of the State Of California. He led me to believe by specifically.. telling me that he was authorized by the California Courts to execute the warrant he was executing 'dray office. I saw Chatfield, in addition to taking the tapes of my conversations with , Teresa Archuleta, to other tapes. These tapes that he took reflected in toto the discussions I had with Teresa Archuleta regarding the policies and practices Of Maricopa County and Maricopa County Attorney's Office, to target minorities, to initiate forfeiture and criminal actions without probable cause. The tape also showed that I had a great deal of records on computers disks. Thc tapc showed that Teresa Archuleta agreed with me that Maricopa County and Maricopa County Attorney's Office targeted for law enforcement purposes, racial minoritics and disadvantaged individuals.

22. The tapes showed that Teresa Archuleta advised me that Gunn McKay, Dean Chatfield, Teresa. Archuleta and Richard Mesh had discussions regarding the challenges that I was making and in the process of making. It also showed that Teresa Archuleta advised me that they had discussed the matters with Richard M. Romley, who approved the plan to take whatever course of action they needed to take, so as to stop me from lodging the challenges I intended to raise. The tapes further show that Teresa Archuleta warned me to

back off further warning me that if failed to back off, I would end up in prison with the Mexicans that we were assisting in the Maricopa County Superior Court. According to Teresa Archuleta on the tape, it was.. imperative I not lodge a successful challenge.

2.3t. Had the defendants complied with documents 87 and 95 and given me all the records.

. I sought by and through my Public Records Request I would have got the tapes and documents - that support the facts, stated in this affidavit.

24. I had a computer file "MC.BB" which I saw Dean Chatfield take on. June 24th, 1992.. This file is .not listed in the inventory list' have since received. This file had • doduments created: • by defendants Richard M. Romley, Dean Chatfield, Gunn. McKay, Terry Blake,. Donald E. Conrad, Richard Mesh, Ronald Harris, Vincent Tolino, Gerald Grant, Teresa Archuleta and other employees of the Maricopa County Attorney's Office and Maricopa. County. The file had a great. many complaints against defendants, for making false and fake allegations and filing inappropriate actions against people, most of whom were radial minorities. These documents showed the existence of a pattern or practice wherein Maricopa County, Maricopa County Attorney's Office and defendants named, falsely accused people of being members of drug all so that defendants could initiate false charges and forfeit property. cartels, engaging in crimes, On June 24, 1992 I saw Dean Chatfield take another file "MC. SSS" which is not listed in the inventory that I have since been given. This file that numerous documents concerning false .arrests made by defendants, - Maricopa County, Maricopa County Attorney's Office and it's employees.

I also observed Dean Chatfield take a file "MC. SSS" and "MC. INT" on. which there were documents that reflected the fact the defendants received a great deal of claims about false arrest and false imprisonment and they paid quite a bit of money so as to settle these claims. . These files and another file "N. ICSOR" had documents that showed defendants seizing property. and other items without probable cause and mainly because racial minorities were involved. This ...file also included copies of claims paid by defendants.

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27. 'personally observed Dean Chatfield take a file "MC. arr: which had documents:' reflecting the fact that defendant target their law enforcement authorities with an eye towards getting minorities. I specifically recollect documents created by Richard Mesh, Vincent Tolino, Gimn McKay, William Clayton. These documents showed that in action• taken by employees of Maricopa County, Maricopa County Attorney, and defendants , race is generally the motivating factor. I also remember documents bearing the signature of Richard M. Romley as authorizing -and condoning the actions targeting racial minorities Included in these file•wad a file "MC:."which had documents, complaints by people that they were targeted based on their racial heritage.

28. Another file taken by Dean Chatfield was "MC. COV." This file had copies of complaints against Maricopa County, Maricopa County Attorney's Office, defendants named and employees of these defendants, with investigative reports finding violations and with notations that Rick Romley wanted the complaints hushed up as the employees were loyal employees and taking disciplinary actions would be bad for their

morale.

I personally saw Dean Chatfield take a file "MC. GUN" which had copies of complaints against Gunn McKay, Dean Chatfield, Teresa Archuleta, Richard Mesh, Gerald Grant, Ronald Harris and others for targeting racial minorities and engaging in the misconduct that I have described. This file had the entire background, since birth, of Dean Chatfield, Richard Romley, Gunn McKay, Teresa Archuleta, Richard Mesh and other employees. The information showed that these people have had a well documented history of complaints against them for misconduct .

I saw Dean Chatfield take a file "MC.ARS" which had copies of documents, showing . that on 20 plus incidents, employees of the Maricopa Count' Attorney's Office bad: . •

—flown I driven outside the State Of Arizona and conducted activities, including searches and' seizures, similar to that in this case. This showed many complaints were made rip but no action was taken on the complaints.

31. Dean Chatfield took a file !WC. FTS" which had numerous 'documents, showing.

• lawyers antiothers complaining against these named defendants and other employees of the. Maricopa County Attorney's Office and Maricopa County. They state that these people, due to . •

' their not being adequately trained, not being adequately supervised, due to their not abiding by existing rules and regulations, have been engaging in the type of wrongs I complain of. These documents hive handwritten notations by supervisory staff. to hush the complaints.

. 32. Another file "MC. DOC" has copies of documents

with many allegations that employees of Maricopa County Attorney, including named defendants, have been engaged in fabricating evidence and making false statements, manufacturing probable cause to seize and forfeit property and falsely asserting they have had lawful authority to in matters they did not.
A file "Md. FB" taken by Dean Chatfield shows use of force and improper tactics by employees of Maricopa County and Maricopa County Attorney's Office to seize and forfeit property, to arrest people. File "MC.FB" had documents that showed. on more than 50 instances, employees of Maricopa County and Maricopa County Attorney have falsely asserted their authority in matters. they had no authority.
The file "MC.SSS" had numerous documents showing that defendants, to pressure people, have contacted other state and federal agencies for help. These files show that they engage in such acts, in matters where people challenge their conduct The file "MC.COV" has showing cover-up of wrongful seizures. I remember that in file "MC.SSS" there were in excess of 30 plus instances, where components have been made, that people whose property were seized. wrongfully, have lost their businesses etc.
35. The file "MC. NT" has documents which show a lot of complaints from people that they were targeted as they challenge the practices of Maricopa County / Maricopa County

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Attorney and /or exercised their First Amendment Rights. File "MC. ST" had in excess of 45 documents showing irregularities in extradition. and Gerstein violations. Dean Chatfield took this file in my. presence.:-

36. When Teresa Archileta was alive, my attempts to have her deposed were obstructed by these defendants, though my request was made prior to February 19, 1994 and though they agreed to produce her for depositions. Teresa Archuleta has since died, hence I hive utilized the statements she made to me during my various communications with her, as she was an employee of the Maricopa County, an agent of the defendants when she made the statements. It is my belief • the defendants did not produce her to be deposed and did not want her to respond to my discovery request, as they did not want her to confirm the substance of our conversations. They had reasons to believe she was giving me information. As promised by Teresa Archuleta, to me, on March 2'7,1992, Dean Chatfield, Donald E. Conrad and Terry Blake, came to my office in California on June 24, 1992. Dean Chatfield arrested me. Dean Chatfield searched my office and brought the seized items to Arizona, he had no authority from the California courts. Seven days after the its were brought to Arizona, concealing the fact that the items were already in Arizona and not in the custody of California officials, Dean asked Richard Goldston, a California peace officer, to obtain authorization from thc California courts to bring the items to Arizona.. The authorization was obtained, seven days after the fact. Dean Chatfield, Donald E. Conrad, and Terry Blake were all aware that they were not California peace officers and could not execute warrants in California. Dean. Chatfield searched my office with Donald E. Conrad's Terry:.. Blake, without any authority from the California courts. These items that seized; were the subject matter a forfeiture action, but I prevailed in that forfeiture, as the defendants

could not prove I used the items to commit any crimes or I had any knowledge that the items were used to commit crime. when I forced the defendants to their proofs they moved to dismiss, as they had. no . evidence.

: I called Teresa Archuleta, a defendant in this case, and spoke to her on August 18,1992.

She upon my questioning her informed that defendants Conrad, McKay, Archuleta, Blake, , Chatfield had a meeting regarding me and that their plan was approved by Richard Mesh and Rick Roxaley. She advised me that, according to McKay I was a "Sand Nigger" who had to be restrained and that they had agreed to do all that was needed to shut me up. Up questioning, she informed that Vincent Wino had to submit the false documents to have extradited aid that he did conceal the fact that these defendants did arrest me in California and searched my.office. She also informed me that Ronald Harris will be aiding them in forfeiting the property and Gerald Grant would create all obstacles possible. Archuleta advised me that they had talked to the Department Of Insurance and they would do all to assist. She did confirm that they had no prior authorization from California to arrest me and search my office. When I asked why she falsely published the fact that I was involved in three murders and a member of the Lopez drug cartel, she stated Conrad & McKay had so asked her so to, and she had to play with the team. She did remind me to think about what happen in the case of the Tucson four, stating that if they can put someone on death row, I am nothing, because they want me out of sight and. Not held somewhere, that I will not be able to do anything. She stated that this is just the way, things are done,

when minorities are involved. She advised me that. she would not be 'able to help.

What was interesting about what she said is that, I reviewed tape interviews that Dean Chatfield did conduct Dean Chatfield was stating what Archuleta said. He was asking people to. help him place a nail in my coffin, telling them that he wants me tucked away for life, and in most of these instances, Donald Conrad was.witb. him, Another interesting aspect of what Archuleta stated is that, everything she said, has been proven to be true. When I got the insurance documents, the documents reflected discussions of the type and plan of that type Archuleta she stated. When I began forcing the defendants to their proof they started backing of

What is very interesting about Archuleta, is that, Illave since. September 1993, served on her request to produce, noticed her for depositions. I have always stated that she was a very key respond to my discovery and did not have her produced lc: depositions, though they waved all the objections. unfortunately, at this time, she is dead and hence, to support what she told me in our discussions, I have to rely a great deal on bits and pieces of documents she executed. .

1 received more than $4,000,000 in assets on June 24th, 1992 and grossed at least $ 1,500,000 a year. My business was worth at least $5; 000,000. I had designed a software toiti7ire artificial human intelligence, which was worth at least $40,000,000. I saw Dean Chatfield take this software on June 24th, 1992 and did not list this on the inventory. Artificial intelligence means a software that had the ability to take instructions and think. Such as the software used in robots to perform heart surgery. I had students from U.C.L.A help me

prepare this and had given the papers so they could be copyrighted.

!received exhibit 3 from the defendants. The letter has six pages of attachments and MS provided to me by the defendants. The letter shows defendants actions against me wire' racially motivated. There is a note dated 10/16/92 which shows that the county attorney was advised against prosecuting me. that note also shows that I was targeted for challenging the county policy of targeting racial minorities. A second note dated 1/ 21 /93 shows the defendants

needed leverage against me. A third note dated 10/6 shows defendants Were fixing decisions to shut me up. There is one thing in common in these notes nobody writes his or her name as I said earlier Teresa Archuleta sent these to me.

39. I received a taped interview from Teresa Archuleta that is transcribed as exhibit 41 This confirms that I was told by Teresa Archuleta. I, as stated here, spoke to her at least 15 times. I talked to her about the practices and policies of Maricopa County. More. than 150,000 pages of documents were seized from my office and these are the documents, on disks. As stated by Teresa Archuleta these documents were destroyed, once exhibits 6 and 7 were entered. They were destroyed, as stated by her, because they were supportive of my position. My property Was seized and brought to Arizona without a court order. When I challenge the defendants, they asked a Richard Goldston to submit false affidavits, contradicting prior orders/statements by courts and defendants. Exhibits-

▸ -defendants show that the employees of the State of Arizona, lost the tape. .

' 40. Letter 5 is a memo I got from defendants. It

clearly shows that the search and seizure and forfeiture were done for inappropriate reasons.
41. Exhibit 14 is the wan-ant and 15 the complaint on which I was arrested by Dean Chatfield. Vincent Tolino and Donald Conrad applied to extradite me and asked the Governor of Arizona for a warrant They submitied exhibit 48 however, they knowingly and falsely advised the Governor I fled the State and was a fugitive.
42.They failed to tell the Governor that I was arrested by Dean Chatfield and was not a fugitive. Donald Conrad in my presence advised the Court that I was not arrested by Arizona authorities in California, knowing this to be false, as he was present when I was arrested.
43. Defendants, to pressure me into not challenging their conduct, had the State Insurance Department change it's own findings. Dean Chatfield sent. exhibit 27 to the State Insurance Department exhibits 21 6.28 and•44 through 46 show that these defendants contained the assistance of the State Insurance Department to prevent me from challenging their actions, but when I persisted in fighting them, the State Insurance Department had to back off •

.44. Exhibit 29 shows a racketeering lien was filed against me by Donald Conrad. Ronald . •
Harris filed a complaint to seize my property as evident by exhibit 30. F.Exhibits 31 through 35 show when I fought the forfeiture and argued that the actions were illegal, the matter was dismissed. I declined the settlement offer.
• 45. Donald Conrad and Teresa Archuleta contacted the Justice Department to pressure me into not challenging them; but I nevertheless insisted in

challenging them.

46. Exhibit 11 is the return to the search warrant. At page R2 of exhibit• 11 it is clear that on July 1,1992 Richard Goldston a California Police went before a California Judge and told her he searched my office and had the property in California. The Judge based on this representations ordered the property released to Arizona. Mr. Goldston gave the Judge a evidence list which is attached to exhibit 11. He writes 92-043 as the case number. This is a fake No. That is the Arizona number. He. writes Dean Chatfield #155 Terry Blake #181 as people searching. These are Arizona agents the defendants. Before the California Judge on July 1:1992 allowed my property to be released to Arizona, exhibit 12 shows Dean Chatfield had the items in Arizona. Mr. Chatfield with Donald Conrad, Terry Blake brought the items to Arizona without orders from an California' Judge. .P. Exhibit 13 shows Dean Chatfield and Terry Blake arrested me and searched my. office I was arrested on exhibit 14 and 15. A tape that supported these facts and the matters in exhibit 4 was sent to me by Teresa Arclnileta also sent me that memo' exhibit 4. When I brought out to the court that Richard Goldston did not search my office and did not arrest me and Dean Chatfield did I was advised by Teresa Archuleta that she called Richard Goldston and •• did so upon instructions of Donald Conrad and Dean Chatfield. Upon the request of Conrad, Chatfield and Archuleta, Mr. Goldston signed two affidavits, exhibits 19 and 20. As Mr. ** Goldston did not how I bad exhibits 12 and 13, he lied as to what took place. .

47. I am now going to talk about counts one and two. Dean Chatfield. on June 24, 1992 took from my office and in my presence, the tape which hat the

conversations I had with Teresa Archuleta, where she advised me that McKay, Chatfield, Mesh, Blake and Archuleta had my business and forfeit my assets. This tape also showed that she told the that Richard M. 'Romley had approved this. On June 24, 1992 Dean Chatfield, searched my office and brought the items to Arizona without the consent of a California Judge as stated earlier. Ronald Harris filed a forfeiture action because my property was seized to forfeit Donald Conrad filed a racketeering lien. I prevailed in the forfeiture and there was no probable cause to forfeit, file a forfeiture. As stated by me before, documentary evidence that showed that this is the common way of doing business in the Maricopa County Attorney's Office, were removed by Dean Chatfield in my presence and as stated by Teresa Archuleta, they were destroyed as they were favorable to my position. This was done in bad faith.

48. Dean Chatfield had no authority to have my property until June 29, 1992— five days after he brought my property to Arizona. .

Evidence,- which supported the tact that the defendants acted in Compliance with the prevailing customs, traditions and practices of Maricopa County to seize property, :without probable cause and to file forfeiture without probable cause, was in. the article, that I observed • Dean Chatfield take on June 24, 199Z.

discuss count three.

During my conversations with Teresa Archuleta, I was told that Dean Chatfield, Donald Conrad and Terry Blake were sent by Gunn McKay, Magid . mesh, Richard Romley, Ronald Harris and by Teresa

Archuleta from County, Arizona to Beverly Hills in California for the explicit purpose of seizing my property. I was in my office on June 24, 1992 and they went in my office and seized my property. They were not welcome in my office when they entered my office without My consent and removed my property. Dean Chatfield on June 25, 1992 had my property in Arizona. He however had no authority to have that property because on June 29,1992, California Courts were told that the prop was still in California. Evidence that showed this conduct was taken in accordance with the prevailing customs, traditions and policies of Maricopa County was in the tapes that Dean Chatfield, I observed took on June 24,1992 and which according to Teresa Archuleta was destroyed by her.

During my conversations with Teresa Archuleta, I was told that upon instructions of Gtmn McKay, Richard Mesh, Richard Romley, Ronald Harris, Teresa:Archuleta, defendants Dean Chatfield, Donald Conrad, Terry Blake were sent to my office and they entered my office without my consent. I had the right to privacy in my office and this right was invaded by these defendants. this invasion of privacy under California Law. The evidence which I bad on disks., and which I observed Dean Chatfield take on June 24, 1992 and which according to Teresa Archuleta was destroyed, supported the fact that it is very common for defer/0%171N to engage in such acts— showed the existence of a custom and tradition of Maricopa County to engage insuchacts.,

I Will now talk 'about counts five and six. I observed Dean Chatfield remove from my office computer files MC.SSS, MC.EB, MC.L\IT, MC.FOR,MC.COV, MC.GUNt , MC.ARS, MC.FTS, MC.EF, MC.ST which

files had evidence of misconduct by defendants and employees of Maricopa County. I also saw Dean Chatfield remove a soft ware.. :dealt with artificial Inman intelligence. One of the goals of Dean Chatfield was to destroy these. because he did not list these items on the inventory and as they were destroyed. Teresa Archuleta advised me that she Grant noon the instructions of Gunn McKay, Dean Chatfield, Gerald Richard Mesh, Richard Romley, Terry Blake, Ronald Harris, Donald Conrad destroyed these items of property. Evidence also supported the fact that defendants acted in compliant-1. with the prevailing customs, traditions and policies of Maricopa County.

I will now talk about count nine. On June 24, 1992 no California Courts allowed Dean Chatfield, Donald Conrad and Terry Blake to take my property. They, upon the instructions of GEM McKay , Richard Mesh, Richard Rowley, Ronald Harris and Teresa Archuleta and as agents of Maricopa County, without my consent, entered my office and stole my property and brought that to Arizona.

Twill now talk about count ten. I had a litigation support business in California where I grossed in low seven figures with a client base of 7,500 lawyers. I had also designed a software with artificial human intelligence that could come up with arguments counter to the presented by the adverse party in litigation, which software was in the testing phase. I was told by Teresa Archuleta that defendants would close my business down if I failed to cooperate with the defendants. •

55. W1102141.S agents of Maricopa County and as stated to me by Teresa Archuleta, upon the directions of GI= McKay, Ronald Maid, Richard

Romley, aka Richard.Mesh, Teresa Archuleta,. Vincent Tolino, Gerald Grant defendants Dean Chatfield, Donald Conrad. and Terry Blake.
- entered my office on June 24, 1992 and removed my hardware, software, records and later destroyed them, they forced me to, close my business. As direct results of their actions I had to close my business. I could not sell my business as removal of the assets impaired the good will under California law. I believe defendants did this in bad faith.
56. I. will now talk about count fourteen. was an tested by Dean and defendants Dean Chatfield, Donald Conrad, Terry Blake were present in the scene' and had knowledge of this 'first hand and defendants Guar McKay, Ronald Harris, Richard Romley, Richard Mesh, Vincent Tolino and Gerald Grant knew of this fact from the tape of my arrest They however did not disclose this fact to obtain a Governor's warrant but withheld this fact to obtain the G ors warrant As is clear this fact was withheld from the Governor Of Arizona. In the exhibit defendants falsely stated I was a fugitive when they knew this was not true and also knew I was in their custody. Evidence that was destroyed by Teresa Archuleta and which I saw Dean Chatfield take from my office, showed that this is a custom and tradition in Maricopa County.
I will now discuss count sixteen. Acting as agents of Maricopa County and according to Teresa Archuleta upon the instructions of Gunn McKay, Teresa Archuleta and Richard Romley, defendants Donald Conrad, Terry Blake and Dean Chatfield held me for 115 days violating Gerstein. Evidence on disks taken by Dean Chatfield in my presence on June 24, 1992 and later destroyed by Teresa Archuleta support the fact

that this was done in compliance with the customs, traditions and policies of Maricopa County.
I will now talk of count seventeen. I am an East Indian, a racial minority. who was challenging various praCtices of Maricopa County, including it's practice of targeting racial minorities for 'searches, seizures, forfeitures. I. was• advised by Teresa Archulitathat MCKiy • called me a "Sand Nigger" who must be restrained at all costs and this is one of the reasons why my property was seized.and destroyed and subjected to an unsuccessful forfeiture. Defendants Dean Chatfield., Blake, and. Donald Conrad seized my property. in my presence and had "according to the tape conversations I had with Teresa Archuleta, they did so on the advice of Richard Rowley, Gerald Grant, Teresa Archuleta and Gum McKay, as agents of Maricopa County. I was targeted by defendants, according to 'Teresa Archuleta, do to my being an East Indian, a racial minority. Had I•not been a racial minority, this would not have had happened. I
observed Dean Chatfield take the disks which had evidence that supported the fact that defendants have a habit and routine of engaging in similar conduct do to the racial heritage of people. Teresa Archuleta states she has destroyed the evidence.
59. I will now talk of counts nineteen, twenty two, twenty eight, thirty two. According to Teresa Archuleta, Gerald Grant, Richard Romley, Gunn McKay, Richard Mesh, Vincent Tolino, Ronald Harris advised Terry Blake, Donald Conrad and Dean Chatfield to (a) search my office
(b) bring the property to Arizona (c) withhold material evidence (d) file the forfeiture (e) engage in the conduct I complain of (f) destroy the property. Dean Chatfield,

Donald Conrad and Terry' Blare bated on their experience knew that the evidence was wrong but they nevertheless decided to follow the advice.

60. I understand Richard M. Romley as a matter of law has the duty to promulgate appropriate rules and regulations that would prevent his employees/ employees of Maricopa County from engaging in the type of conduct I complain o£ He has intentionally refused to promulgate these rules and regulations as the evidence that Dean Chatfield took on disks on June. 24, 1992, showed that he liar so refused to act because it is the prevailing custom, tradition and - practice of Maricopa County and .is the evidence showed. Richard Rowley condones the type of conduct I complain of Teresa Archuleta as stated in this affidavit, destroyed the dicks Had . Richard Romley promulgated appropriate rules and regulations regulating the types of wrongs I complaint of; the wrong would not have happened. Richard Romley, knows from his experience and prior complaints that employees of Maricopa County engaged in such conduct

61. Madcap!. County has in existence a code of silence that I have set forth earlier in this affidavit Under the code employees remain silent regarding misconduct by other employees.

•

This code is deeply embedded in the system and is encourage by Richard M. Raraley. When Gum McKay Dean. Chatfield. Terry Blake, Donald Conrad. Richard Mesh, Ronald Harris, Richard Romley, Vincent Tolino, Gerald Grant, Teresa Archuleta became privy to the fact that defendants engaged in the conduct I complain of, they did nothing, due to the code of ' evidence. The evidence on disks that I saw Dean Chatfield take and

which was destroyed. by Teresa Archuleta, show that there is a custom and tradition in Maricopa County— a custom of a code of silence.

But for the code of silence I would not have been injured.

In order to prevent the wrongs I have complained of from being discovered and disclosed, defendants Gunn McKay, Dean Chatfield, Terry BIAlem, Donald Conrad, Richard Mesh, Richard Romley, Ronald Harris, Vincent Tolino, Gerald Grant, Teresa Archuleta covered up for one another. They (a) obtained false declarations and affidavits from Richard Goldston, • which declarations/ affidavits contradicted testimony sworn to before Judge CP (b) altered internal records (c) destroyed evidence (d) failed to document the misconduct set forth by me. All of this was done in compliance with the prevailing customs, traditions and policies of Maricopa County, fully set forth in the tapes that Dean Chatfield took and which was destroyed by Teresa Archtdeta4

64. The code of silence and cOver up systeth-described by me in this.affidavit,:is very. prevalent:.

65. But for the code of silence and cover-up I would not have been subjected to the conduct in the complaint....

I Will now. talk of count twenty one. I provided litigation support to in excess of 7,500 lawyers and had a low seven figure of gross income. I was advised on March 27,1992 by Teresa *Archuleta that my business shall be closed by defendants for the reasons. stated in this affidavit. . By and through the conduct in this affidavit that defendants did engaged in, my business failed. was pliable to continue with my business because of the conduct of the defendants.

I will now talk of count twenty four. I entered into oral and written contracts with defendants Donald Conrad,

Gunn McKay, Dean Chatfield, Ronald Harris, Richard Romley, Teresa Archtileta, Richard Mesh, Vincent Tolino, Gerald Grant and Maricopa County by and through their lawyers. I, in accordance with the contracts, agreed to wave certain claims against the defendants, in exchange for which, they agreed to give the documents and evidence taken on Arne 24, 1992 and any and all other information I desire. They also agreed to pay all the costs involved. However, at the time they entered into the contracts, they had no intentions of giving me the documents and evidence, they did not disclose their intent and entered into these contracts in bad faith. They induced me into entering these contracts based on their representations that they shall provide me the documents and evidence, 'snowing that to be false. i entered into these contracts based on material misrepresentation discussed earlier. I would not have entered into the contracts had I know the defendants did not intent to comply with their end and made false representations. They did this intentionally and in bad faith.

64 I will now talk of count twenty nine. The materials that defendants agreed to produce, • were those that were seized from my office that Dean Chatfield took in my presence. They are also materials that constitute evidence, such as, (a) my taped conversations with Teresa Archuleta. That I have described in this affidavit (b) the evidence that Were on disks that Dean Chatfield took and which supported the facts that I have stated in this affidavit. According to. Teresa Archuleta She has destroyed these materials at the directions of Donald Conrad, Gunn McKay, Deitin Cluitfield, Richard Rowley, Richard. Mesh; Gerald Grant and others...

. •69. Because of this fact, I am able. To provide the evidence in the form of documentation, to support each and every fact I have stated in my complaint. Had the defendant produced the evidence as aimed, and had they not destroyed$ the evidence, I would not have bees injured, and could have produced the necessary evidence.

70. I would now talk of count thirty one. The disks I saw Dean Chatfield take on June.24, 1992 had documents showing that it is the prevailing customs, tradition and policy of Maricopa County to retaliate against those individuals who challenge the conduct of employees of Maricopa County or those who halleitge the prevailing customs, traditions and policies of Maricopa County. If one happens to be racial minority, he is treated El/Sher than non-minorities is what the evidence showed. I was retaliated against by defendants Gunn McKay, Dean Chatfield, Terry Blake, Donald Conrad, Richard Mesh, Richard Rowley, Ronald Harris, Vincent Tolino;-Gerald.Grant, Teresa Archuleta, Maricopa County because I was challenging those practices I have described in this affidavit. Had I not (*aliens the practices there would not have been no retaliation. As retaliation defendants subjected me to the conduct in this affidavit. 71. Had Dean Chatfield not taken the disks and had Teresa Archuleta not destroyed them, I could not pave produced that evidence needed to support this...

72. I will' now speak of count thirty seven: The documents that I had in the disks which I saw Dean Chatfield take on June 24, 1992 showed that it is the custom, tradition minority. After having a meeting discussion amongst them. Defendants Donald Conrad, Gunn McKay, Dean Chatfield, Ronald Harris, Richard

Rowley, Richard Mesh, Teresa Archuleta, Vincent Tolino, Gerald Grant, acting in compliance With the prevailing customs, traditions and policies of Maricopa County, decided to deny me equal protection of laws and equal privileges of the laws. In furtherance of the conspiracy, Dean Chatfield Donald Conrad and Terry Blake traveled to my office in 'Beverly Hills, California. They without authorization seized my property, brought them to Arizona, destroyed my property and caused my business to close. Trhis1ouot have happened had I not been an East Indian, a racial minority and because of the invidious discrimination against racial minorities in Maricopa County.

Dean Chatfield on June 24, 1992 took the tapes which show Teresa Archuleta advising me of the facts and the disks with documents supporting these facts. These were destroyed by Teresa Archuleta as set forth in my affidavit.

I will now speak of count forty three. Betsey Bayless, Tom Rawles, Ed King, Dun Stapley, Mary Rose Wilcox and Maricopa County on a case by case basis pay punitive damages. .

They review each case with as evil motive and in bad faith authorize payment. of punitive damages. They do so improperly. They authorize generally all punitive damages as it is their policy to condone, foster, approve either before or after the fact, ratify, take no action to correct, the official procedure, practice, custom and tradition, the type wrongs I complain of in the complaint:They.conduct perfunctory review•and. act contrary, to best interests of Maricopa

"County to engage in the type Of wrongs4 Complain of. If defendants would not:I:ay-punitive . damages, employees would not do whit they did tome. I had

personally discussed this issue with Mr. Ed King. According to Mr. King they do • only cursory reviews. of each claim and there is .nothing he can do to stop the practice as it is a big bureaucracy. He informed me that he* • personally knows that the practice is deeply .embedded in the system, but unless some Jury decides what they were doing was illegal, it will not change. I believe his statement to mean they did not care. I tried to get de positions of the members of the board, and though defendants; agreed to produce them they did not

75. Recently, four individuals were arrested by Mariposa County for the temple murders. Richard Romley and others wanted. to give them the death penalty. they, were innocent The County paid them millions. Scott Nordberg was killed by staff of Maricopa County and he got paid millions. Rone Krone was put on death row and later given life, though he did not do any crimes. The county may be paying him.

The disks that Dean Chatfield took on June 24, 1992 had a listing and relevant documentation showing hundreds of cases, where punitive damages were paid. These show that employees of Maricopa County know. that no matter what they do, they will be protected. Had Dean Chatfield, Donald Conrad, Gunn McKay, Ronald Harris, Richard Romley, Richard Mesh, Teresa Archuleta, Vincent Tolino, Gerald Grant known that they are not protected from punitive damages awarded against them, they would not have engaged in the wrongs I described.

I, as stated by Teresa Archuleta, talked to her at least 15 times about the policies of the County, the Lopez case, my arrest the search and seizure ect. During our discussions she advised me that as I was creating

waves I will be shut down. She asked me to back off but I refused.. ;

... 78. I sent many letters to defendants ask for documents taken from my office. They agreed twice as evident by exhibits 6 and 7 to give me those. They did not give to me .

•

When I talked to Teresa Archuleta, she informed me that those documents were destroyed by her

she confirmed the fact that lawyer Jeffrey Bernick and Donald Conrad, Gunn McKay, Geral& .- • .

Grant instructed to destroy them because they confirm what I have testified to..

79. Mr. Goldston. On the request of Chatfield, Conrad and Archuleta, helped the defendants cover up what happened. He helped them hide the fact that defendant arrested me.• • • searched my office and brought the property to Arizona without the order of a California Judge.

80. As the State Insurance Department relied on far evidence given by defendants, they had no choice but to dismiss the charges. In fact I spoke to an employee of the State Insurance department about this issue . She told me everything in exhibit 36.

81. I received from Teresa Archuleta exhibit 49. This shows that defendants Conrad and Chatfield really wanted to stop me. They told Mr. Frank Cotter not to testify for me Mr.: Cotter • has since died. Mr. Conrad and Chatfield submitted exhibits 9 and 10 to the court, but the court refused to believe what they said, as these are false Ronald Harris and Gunn McKay prepared

these. We all know that we cannot walk into a bank and borrow $ 4000,000 with no security. Mr. Conrad and McKay manufactured facts to stop. me. Exhibits 17

show this fact a Helen Jones in her affidavit exhibit 47 also supports this fact. Mr. John Naughton was killed by D.P.S. I received a tape from Teresa Archuleta with her statement and also 80 pages of paper that support her statement. Prison officials lost the tape and the 80 pages as shown by exhibits 37, 38 and 39. They offered to pay me $8.00 and gave me exhibit 50 ,51 however, on 10/29/99 a Judge Ronald Reinstein called prison staff and talked to them. An affidavit by a Judy Gabbert shows this :.of . exhibit 54: Prison. staff destroyed evidence upon the request of the Judge as stated is exhibit 53.-

82. included in my 150, 000 pekes were thousands of documents. I had personally. . scanned these onto disks that I personally saw Dean Chatfield take from my office. These documents had complaints by Blsnic9 and Hispanics against Maricopa County Attorney for are some of the documents that were destroyed by Teresa Archuleta exhibit 8 have some of these . complaints. As stated in exhibit 8 all defendants knew of the complaint. I was preparing: •• emotion before my arrest..this how I have these names.....

83. It is my understanding that in Federal Court all Parties must exchange all evidence .

rs--before trial. Defendants did not give any evidence except exhibit BP.

84. In my office, at 8484 Wilshire Boulevard, suite 600, Beverly Hills, California 90211, County, came without my inviting them. They were armed. On June 24, 1992, they searched my office. they brought the items they seized to Arizona and they did this, on June 24, 1992. Seven days after they brought the items to Arizona, did they go and get a court order from the California Court that allowed them to bring the items to Arizona. To get

this order; they did not tell the California Judge that the items were already in Arizona but instead tell the judge that the items were still in California. They had no authority on June 24, 1992, to act as a Peace Officer in California as no California Court gave them the authority. They did all this without my consent.

85. I believe defendants acted as recklessly incompetent practitioners in their fields, because any practitioner in their field, would have known that, their authority is limited to Arizona, that before they go out of Arizona, they must obtain prior court orders that they mast competently investigate. They had a duty that they assumed, when. they targeted me, but • breached that duty.,

8.6. Dean Chatfield; 'annecl misrepresenited to me, his authority and his misrepresentation. was that had the authority from California Comm. to be in my office, arrest me and search my office and bring the items to Arizona. He did not, at the time he engaged in the acts. He invaded my privacy and he at the same time, without any authority from California Courts, brought to Arizona my office equipment, hardware, software. and other office records and files. .

87. By the conduct forth here, defendants impaired the goodwill of my business..

88: By stealing my software, my office programs, my client files, and my marketing programs they injured my business which is closed.

89. By their conduct defendants have prevented me. from collecting the moneys that is owed to me by Helen Maureen Jones and Robert Fred Girdley.

90. 1, have very extensively programmed computers and have taught students who have various computer languages and how the computer operates. Based on

taken computer science, my educational qualifications and based on my extensive experience in computers, no person, alive or dead, can ever state who created documents in a computer or who used a computer, unless access is restricted. In order to state who has created documents or who had knowledge that the documents did exist, one must physically observe somebody place documents in a computer or use a computer. I am very much Ciniilior with how postage meter works. Once again, absent anyone observing someone using a postage meter no person can that any particular person used the meter. I know and am 100% certain, that Dean Chatfield, Donald E. Conrad, Terry Blake, Ronald Harris, Gunn Mckay,, Teresa Archuleta, Richard Mesh; Richard Romley, Gerald Grant, had absolutely no way of knowing,. that my office equipment was used by me or up in my directions to commit crimes. I know for certain• that there does not exist any computer

:Frierine or system, by which, any person can say, that I Used or allowed the used of my equipment to commit crimes. I, personally observed Donald Conrad state that there was no way to prove these facts. I was and am, actually innocent of using my property to commit crimes. When I demanded the State prove case, the state Moved to dismiss. Dean Chatfield acting with the other defendants fabricateprobable cause in the matter:'

91:. I made $1,500,000 a year and was 38 years old. Assuming I had no increase in. .•

.business I would have worked until age :Is. In 40 years I would have made 360,000,000s'.

My software was to be sold for $40,000,000 and I was still negotiating.

I had at least $5,000,000 in law books.
94. Additionally I had people make offers to buy my business these varied from $10,000,000 to $20,000,000, depending on the terms.
95. I have permanently lost the ability to operate my business."
Helen Maureen Jones: She will testify to the fact that probable cause was manufactured and the plaintiff did not try to defraud her.
Roger Rudman: He will testify plaintiff did not use the land to defraud him and probable cause was manufactured. (\,i444 a.)
A. Melvin McDonald: He will testify that as counsel he knew plaintiff did not try to defraud anyone with
good example.
If the warrant is based upon fraud, and there was no reason to believe that there was any firearms involved, and if they seize a firearm, unless it was within the scope of the warrant, it could not be seized, and that particular piece of evidence or that item would be suppressed.
The other possibility is if they exceeded the scope not within the parameters of the warrant, meaning that the magistrate didn't allow them to go into the attic or into the basement, that they would exceed the scope. I've seen nothing that even resembles that in your petition.
MR. TRIPATI: But, your Honor -- there are a few things. First of all, the warrant specifically authorized California authorities to execute the warrant. Secondly, the warrant --
THE COURT: All right. Assuming that to be true, that's not a constitutional issue.
MR. TRIPATI: It's a constitutional issue of the

California Constitution --
THE COURT: No, no, no, no, no. Once more, you cannot raise the California Constitution in the federal District Court.
MR. TRIPATI: It's a diversity action, your Honor.
THE COURT: Well, that's a diversity issue that I will decline to consider, because unless you have a constitutional claim in this court, meaning federal jurisdiction, I have the right, under 1367, supplemental jurisdiction, to decline to consider your state cause of action. In this case I would, because it is unclear to me, from my research, that merely because the officers, assuming everything to be true, were Arizona officers, that violates the Constitution of California. In fact, the only way it could violate the Constitution of California would be if the magistrate who issued the warrant and found probable cause did not have authority, or the magistrate violated the Constitution in one way or another. That issue is not before the Court.
Now what else do you have?
MR. TRIPATI: Well, as I said, your Honor, they exceeded the scope of the warrant when they took the items. They took --
THE COURT: You handed them to him.
MR. TRIPATI: Yeah, but they said they wanted it. They said they want the items.
THE COURT: Well --
TRIPATI: For example, Dean Chatfield -THE COURT: No, no, wait a minute. Wait a minute. Mr. Tripati, if they exceeded the warrant and they ask you for them, then you have a right to refuse them, but you consented. That's number one. Number two, I do not see, in any way, how the seizure of these particular

items exceeded the scope of the warrant.
Now they asked you for things, and I think you wisely, at that time, showed them where the things could be found, as opposed to allowing them, as the warrant would, to search the entire house, everywhere, every place, and disrupt things, so they could find a needle in a haystack.
If the district court or if the magistrate judge -- magistrate judge or commissioner, whatever they are called in California -- had a warrant presented to them that sought a needle that happened to be, let's say, the weapon in an assault, and they knew they had probable cause to believe it was in a home, then the officers would have the right to go from top to bottom, right to left, to look for that needle in a haystack, because that would be within the scope of the warrant.
Now they are broadly construed because the officers cannot set forth exactly what they expect to find. They are required to set forth what they anticipate they will find, but in the investigative stage, which the officers are engaging in, they can only anticipate what they expect to find.
Now at the time of trial there is often much more evidence, and at the time of trial the prosecutor decides to use some and not others for a whole variety of reasons, and not because it was improperly seized.
All right. Now what else do you have?
MR. TRIPATI: Well, your Honor, like I said, I was told my property would be seized. It was seized for a civil forfeiture, not for a criminal trial. They filed a forfeiture. The forfeiture terminated in my favor. They were not allowed to take the property from my office until July 1st.
THE COURT: Well, it was construed in your favor

because the law enforcement officers, or the charging agency, decided to withdraw the issue. Withdrawal of the issue does not establish, as a matter of law, as we call it in a civil case, Les judicator or issue preclusion. It does not result in a decision in your favor that there was a constitutional violation.
MR. TRIPATI: But your Honor --
THE COURT: The Judge never made that decision.
MR. TRIPATI: You're correct, your Honor, because it was not briefed. The reason why it was dismissed was because they brought the property to Arizona on June 24th They were not --
THE COURT: Well, now the question is Heck v. Humphrey. The question is does it survive.
MR. TRIPATI: Well, the items were never used in my criminal case. It has nothing to do at all in my criminal case. No way in the world can anybody say that taking my computers, the software, the reader, all the claims against the county attorney's office had anything to do with my fraudulent schemes or the charges that --
THE COURT: Well, I disagree with you. You are looking at it retrospectively. You have to look at it -- when you look at it, you're really looking at it prospectively. You have to look at it retrospectively, and where you start is the warrant. You have not established at all the first aspect, which is that the officers acted, pursuant to Franks v. Delaware, with the intent to deceive.
Your conjecture is not going to get it. Even if you took the stand and began to tell the jury that, if there is an objection from counsel, I would sustain it --
MR. TRIPATI: Well, your Honor, it's --
THE COURT: -- because it's nothing more than

conjecture.
MR. TRIPATI: Your Honor, it is not conjecture; I taped the conversations. I made copies of all those documents. I personally put them on the disks, and I was told on March 27, 1992 -- and Dean Chatfield took those tapes I have -- that if I do what I continue to be doing, my office will be searched and I will be arrested.
Arrested has nothing to do with it. They didn't use anything at all from -- they took my software, all the hardware, they took everything, which had nothing to do with my criminal case. For example --
THE COURT: Okay. If it has nothing to do with your criminal case, what's the constitutional issue?
MR. TRIPATI: The constitutional issue is the wrongful seizure of my items in retaliation for my challenging them. They seized it to forfeit the property.
Now, what you are saying is that Judge Coughman did not resolve it --
THE COURT: Well, okay. Mr. Tripati, we're going around in circles here.
MR. TRIPATI: I understand.
THE COURT: If it was the wrongful seizure of your property, pursuant to the federal Constitution, that issue has been resolved. You did not get -- the decision of Judge Coughman resolves the issue, because Judge Coughman didn't hold that it was unconstitutional or constitutional.
MR. TRIPATI: You're correct. He did not hold anything.
THE COURT: Okay. It was really withdrawn from the court.
MR. TRIPATI: Yeah, it was not briefed, your Honor is right. That issue was not raised in my criminal case, because the property was not used at all

in my criminal case. Those items were not used.
THE COURT: Okay. So that's the first step. It was not resolved, so then the question is can you raise it in this court, and does it survive your conviction?
Technically I would say, based upon what I know of the law and the evidence that was presented, I would say yes, it was not necessary in order for you to be convicted, because you got convicted, and they selected this evidence. They selected the evidence that they wanted to use for conviction purposes. It just so happens that they didn't use the evidence that they seized, or at least this evidence. Then you would have a right to raise the constitutionality of that seizure, as long as it wouldn't
be result-oriented, meaning as long as it wouldn't affect the verdict.
The problem, when we get to that point, is this: I don't see that what you have raised, in any respect, constitutes a violation of the federal Constitution. You have just raised the issue, but you have not offered evidence that would establish it.
Frankly, it's like a moving target. The issue you have raised was not carefully briefed. It seems to me now that you're arguing something that we really haven't heard before.
It was very difficult to figure out what your issues were, but let's assume that you have raised this properly, and you have raised it before this Court as a constitutional issue that survives your conviction. Tell me what evidence there is to establish that there was a constitutional violation?
MR. TRIPATI: Your Honor, first of all, when they executed the warrant, they took -- I'll give you one example -- my disks. They took my -- which is not listed

in the items they seized. When they give you a list of items they seize, it's not listed in the items. It's missing. It's not there.
Secondly, when they executed the warrant, they took disks of complaints against the county attorney's office. It's not listed in the property inventory. It's not there at all.
Thirdly, they brought all those items to Arizona on June 24th, but on July 1st, they went in front of Judge Candice Beson and told Judge Candice Beson, in writing -and I have the papers that they filed -- that Dean Chatfield and Terry Blake were California peace officers who executed the warrant. Unfortunately, the mistake they made --
THE COURT: Wait, wait, wail— They told the Judge --
MR. TRIPATI: Candice Beson.
THE COURT: Wait, wait. They told the judge here that those officers signed the warrant; correct?
MR. TRIPATI: The officers that searched my office.
THE COURT: But the officers that signed the probable cause statement were California officers; correct?
MR. TRIPATI: Yeah. They relied on Dean Chatfield's probable cause.
THE COURT: Okay. Let's assume that it's accurate that they told the judge here that the California law enforcement officers executed it, meaning they were the ones who actually took part in the execution of the warrant, and in fact, the Arizona officers did it all and the California officers had nothing to do with it. That's not a constitutional violation.
MR. TRIPATI: But in order to -- in order to get my property from California, they told that to a California judge, to Judge Candice Beson in California. When

Judge Candice Beson authorized the defendants to take my property, she was under the assumption, based on the documents she was presented, that California authorities were executing the warrant in California. In the paperwork they filed, they put down Dean Chatfield, his badge number, Terry Blake, his badge number, and the Maricopa County attorney's file number.

THE COURT: All right. Okay. Let me just repeat again:

Now the California magistrate was told that California officers were going to execute the warrant, but in fact you know, because you were there, that Arizona officers executed the warrant. No constitutional violation, unless we look at the Constitution to determine whether or not the warrant exceeded the scope of the -- or the execution of the warrant exceeded the scope, or the warrant itself, on its face, was unconstitutional.

There is nothing in the Constitution which provides the following: When a warrant is issued by a neutral magistrate, and executed by officers other than the officers who are represented to execute the warrant, that that constitutes a violation of the Constitution in any Way.

MR. TRIPATI: But your Honor --

THE COURT: The only issue that you've raised is whether or not they told the truth, and whether or not they told the truth could have some relevancy as to whether or not the evidence should be suppressed. That's a Franks v. Delaware issue, but the evidence was not used.

Let's assume for a moment that the officers --

December 12, 94 letter

February 19, 95 memo

February 9, 95 memo
Affidavit
Warrant request
July 12, 93 letter
January 18, 2000 memo
November 24, 99 memo
Affidavit
Information report
letter
Discovery
Archuleta affidavit
Interview tapes
Arrest tape
4
Taugner declaration
Arvita
martin order

OBJECTION TO DEFENDANTS EXHIBITS

1. As plaintiff was not arrested on an indictment, he objects to defendants exhibit 10. Additionally, this case does not deal with the criminal charging issues but with a forfeiture, search and seizure. Irrelevant.

2. Plaintiff objects to defendants exhibit 11 as being irrelevant as this case does not deal with a criminal case but forfeiture, search, seizure.

N. MOTIONS LIMINE

Plaintiff shall file the following motions:

To prevent use of priors.

To prevent use of litigation history.

To prevent retrial of the criminal case again.

To prevent use of Taugner testimony absent disclosure of the underlying facts he gathered which were used to form the basis of his declaration and his testimony.

To prevent use of any matter in the Martin order and

his testimony absent disclosure of the facts that form the basis for the order.

To prevent defendants from denying the allegations in the complaints set forth by plaintiff, absent their disclosing all complaints against their employees and all executive minutes of the Board Of Supervisors.. To prevent defendants from arguing no complaints were filed .against them, absent disclosure of their employment files.

Limiting the use of defense testimony to matters not objected to by plaintiff. In the event defendants desire testimony on objected issues, they should disclose the facts.

They should. disclose all investigation conducted. by the witnesses, all interviews they conducted, all conversations they had all documents they received, created and sent, all handwritten notes regarding the subject matter of the testimonies.

Q. TRIAL

Plaintiff needs three trial days to present his case and this is clearly set forth in doc 439.

R. MISCELLANEOUS

Defendants arguments about the iFP status is frivolous. Their\argument as to plaintiff's testimony is a use.

ANANT KUMAR TRIPATI

Supplemental affidavit: 901, 1002 F.R.E.; foundation; hearsay; relevance.

Supplemental affidavit: 901, 1002 F.R.E.; foundation; hearsay; relevance.

13. Report: 901, 1002 F.R.E.; foundation; relevance;

hearsay.

Complaint: Relevance
Correspondence: 106, 403, 1002 F.R.E.; relevance; hearsay. [There are 31 letters contained in this category which Defendant his listed specific objections A. through EE. below.]
07-16-93 to Michael Sullivan ("Sullivan") re discovery requests. 403 F.R.E.; relevance; hearsay.
09-12-93 to Sullivan re discovery. 403 F.R.E.; relevance; hearsay. 403 F.R.E.; relevance; hearsay.
10-15-93 to Sullivan re Request For Admissions. 403 F.R.E.; relevance; hearsay.
11-30-93 to Tripati from Sullivan. 403, 1002 F.R.E.; relevance;' hearsay.
02/13/94 to Sullivan re discovery. 403 F.R.E.; relevance; hearsay.
02/•4/94 to Sullivan re discovery. 106, 403, 1002 F.R.E.; relevance; hearsay.
02/16/94 to Sullivan re discovery. 106, 403 F.R.E.; relevance; hearsay.
02-18-94 to Sullivan re Request For Admissions. 106, 403, 1002 F.R.E.; relevance; hearsay.
02-18-94 to Sullivan re discovery. 106, 403, 1002 F.R.E.; relevance; hearsay.
03-21-94 to Jeff A. Bernick ("Bernick")re discovery. 403 F.R.E.; relevance; hearsay.•K. 03-23-94 to Bernick re stipulation. 106, 403 F.R.E.; relevance; hearsay.
L. 03-24-94 to Bernick re Trevino v. Gates claims and dismissing them. 403 F.R.E.; relevance; hearsay.
03-28-•94 to Bernick re discovery and depositions. 403 F.R.E.; relevance; hearsay.
N. 03-29-94 to Bernick re discovery. 403 F.R.E.; relevance; hearsay.
0. 03-31-94 to Bernick re discovery, violation of

court order. 106, 403 F.R.E.; relevance; hearsay.
04-12-94 to Bernick re discovery. 106, 403 F.R.E.; relevance; hearsay.
04-18-94 to Bernick re .'discovery and depositions. 403 F.R.E.; relevance; hearsay.
04-26-94 to Bernick re sanctions, discovery [states Defendants' complied and filed discovery responses]. 403 F.R.E.; relevance; hearsay.
05-17-94 to Bernick re discovery; defenses. 106, 403 F.R.E.; relevance; hearsay.
T. 05-19-94 to Bernick re discovery. 403 F.R.E.;
05-04-04 to Bernick re discovery, depositions. 403 F.R.E.; relevance; hearsay.
05-25-94 to Bernick and John W. Storer, III ("Storer") re discovery. 403 F.R.E.; relevance; hearsay.
No date to Bernick and Storer re discovery [states Defendants answered Plaintiff's Requests For Admissions on 05-04-94]. 403 F.R.E.; relevance; hearsay.
03-06-95 to Bernick re discovery and potential consolidation of Plaintiff's new case for malicious prosecution. 403 F.R.E.; relevance; hearsay.
05-16-95 to Bernick re Joint Report under Rule 26(f). 106, 403 F.R.E.; relevance; hearsay.
05-19-95 to Bernick re Joint Report and Pretrial Memo. 403 F.R.E.; relevance; hearsay.
AA. 06-20-95 .to Bernick re rule 26(f) report, discovery. 403, 805 F.R.E.; relevance; hearsay.
BB. 06-24-95 to 'Bernick re discovery, seized property, 'settlement. 403, 805 F.R.E.; relevance; hearsay.
CC. 07-20-95 to Gregory P. Gillis ("Gillis") re discovery. 403 F.R.E.; relevance; hearsay.
DD. 07-24-95 to Gillis re deposition. 403 F.R.E.; relevance; hearsay.

EE. 07-09-97 to Bernick re disclosure. 106, 403 F.R.E.; relevance; hearsay.
17. John Naughton affidavit with letter: 805, 901, 1002 F.R.E.; foundation; relevance; hearsay.

relevance; hearsay.

F.R.E.; foundation; hearsay; relevance.
Racketeering lien: 403, 1002 F.R.E.; relevance.
Complaint: 403 F.R.E.; relevance.
Chatfield affidavit: Hearsay.
Harris affidavit: Hearsay.
May 10, 1994 letter: Hearsay.
February 22,1994 Order: 403, 901 F.R.E.;
May 18, 1994 Order: 403, 901 F.R.E.; relevance; hearsay.
Robert Savage transcribed statement of Jane Doe: 106, 805, 901, 1002 F.R.E.; relevance; hearsay.
Inmate contraband/property release: 106, 403, 901, 1002 F.R.E.; relevance; hearsay; foundation.
hearsay;
F.R.E.; relevance;
March 5, 1993 Order: 403 F.R.E.; relevance.
January 25, 1994 Order: 403 F.R.E.; relevance.
142. April 5, 1994 Order: 403 F.R.E.; relevance.
September 19, 1994 Order: 403 F.R.E.; relevance.
December 22, 1994 letter: 403 F.R.E.; relevance; hearsay.
February 9, 1995 memo: 403, 901, 1002 F.R.E.; relevance; hearsay; foundation.
Order vacating cease and desist (02-09-95): 106, 403, 901, 1002 F.R.E.; relevance; hearsay.
Affidavit: 403, 805, 901, 1002 F.R.E.; relevance; hearsay; foundation.

Warrant request: 403 F.R.E.; relevance; hearsay.
July 12,. 1993 letter: 403, 805, 901, 1002 F.R.E.; relevance; hearsay; foundation.
January 18, 2000 memo:
relevance; hearsay; foundation.
51. November 24, 1999 memo: 403, 901, 1002 F.R.E.;
relevance; hearsay; foundation.
Information report: 403, 901, 1002 F.R.E.;
relevance; hearsay; foundation.
Surety's bonds: 403, 901, 1002 F.R.E.; relevance; hearsay; foundation.
55. Local Rule 11(K) Statement: 106 F.R.E.; relevance
Interview tapes: 901 F.R.E.; hearsay; not produced; foundation.
Arrest tape: 901 F.R.E.; hearsay; not produced; foundation.
159. Taugner declaration: 106 F.R.E.; missing page 88; not complete.
60. Arvita: 403, 901, 1002 F.R.E.;
foundation;
relevance; hearsay.
Sultan affidavit: 403, 901, 1002 F.R.E.; foundation; relevance; hearsay.
Guy affidavit: 403, 901, 1002 F.R.E.;
foundation;
relevance; hearsay.
Opening: 403 F.R.E.; remarks of parties or counsel in opening statements or closing arguments is not evidence.
June 20, 2003 letter [from Tripati to defense
counsel Frazellei: Rule 408; relevance; hearsay.
66. June 27, 2003 response [from defense counsel

Frazelle to Tripati): Rule 408; relevance; hearsay.
Defendants
Criminal Complaint signed by Magistrate Walter Bloom of the West Phoenix Justice Court, No. 92-01275FE dated June 23, 1992.
Warrant For Arrest No. 92-01275FE for Anant K. Tripati.
Affidavit for Search Warrant prepared by Dean C. Chatfield on June 23, 1992 at 9:17 A.M. and signed by Honorable Ronald S. Reinstein, including attachment no. 1.
Search Warrant SW No. 92-00172 signed by the Honorable Ronald S. Reinstein June 23, 1992.
Search Warrant and Affidavit prepared by Richard Goldton and signed by Magistrate Candace J. Beason on June 23, 1992 at 2:38 P.M.
Statement of Probable Cause.
Los Angeles County. Jail Booking and Property Record re: Anant K. Tripati.
Return of search warrant signed by Dean C. Chatfield June 25', 1992.
Search Warrant - Evidence, List Case No. 92-043.
1989 Grand Jury Manual.
Copy of Maricopa County Attorney's Office Procedure 1.2, Charging Standard: Likelihood of Conviction.
Governor's Warrant and associated documents. 13. California State Bar Records pertaining to the suspension of Frederick A. Romero (Cal. State Bar Court Case Nos.: 97-0-11606; 94-H-17475-JER; and 91-C-05240-JER.)(For impeachment purposes.)
Certified copy of "guilty" Judgment And Probation/Commitment Order of Anant Kumar Tripati from United States District Court for the District of Wyoming, Docket No. 83-00076-01B, dated January 6,

1984.
Certified copy of Indictment, No. CR92-08576, State of Arizona v. Ananti Kumar Tripati dated October 16, 1992 re fraudulent schemes and artifices.
16. Certified copy of Arraignment, No. CR9208576, State of Arizona v. Ananti Kumar Tripati'dated October 16, 1992 re fraudulent schemes'and artifices.
p17. Certified copy of Sentence Of Imprisonment, No.
CR92-08576, State of Arizona v. Anant Kumar Tripati. dated
November, 30, 1993 re fraudulent schemes and artifices.
Certified copy of Memorandum Decision from Court of Appeals, State of Arizona, Division One, No. 1 CA-HC 93-0011, dismissing Defendant Tripati's appeal from Maricopa County Superior Court Cause No. CR92-08576, the conviction re fraudulent schemes and artifices.
Copies of pleadings and records in Case No. BA060543 Criminal Division 30 of the Los Angeles Municipal Court (0629-92 - 10-14-02)
20. Probation records of Anant K. Tripati, Reg. No. 77891-012, including Supervision Reports prepared by Jacqueline Benfield.
Copies of judgments, orders of dismissal, appellate decisions as described in Plaintiff's Fifth Amended Complaint.
Maricopa County paralegal job description.
23. Certified copy of death certificate of Teresa Archuleta.
Objections To Defendants Exhibits By Plaintiff
As Plaintiff was not arrested on an indictment, he objects to Defendants Exh. 10. Additionally, this case

does not deal with the criminal charging issues but with a forfeiture, search and seizure. Irrelevant.
Plaintiff objects to Defendants Exh. 11 as being irr4evant as this case does not deal with a criminal case but forfeiture, search, seizure.
Plaintiff objects to Exh. 12 to the extent they include documents not disclosed.
Plaintiff objects to Exhs. 13, 14, 15, 16, 17, 18,
19, 20 and 21 as they have not been .disclosed, are irrelevant, prejudicial, lack any probative value, cannot be admitted for their truth.
5. Plaintiff objects to Exh. 22 as being irrelevant.
N. MOTIONS IN =NINE AND REQUESTED EVIDENTIARY RULINGS Plaintiff
Plaintiff shall file the following motions:
What Defendants are saying is simple, they are law enforcement agents, so whatever they are as true, but Plaintiff is a felon and prisoner, so everything he states is false. In essence they are saying, "Judge, trust us, we won't lie to you. When we tell you Tripati is lying, he is lying. We never lie to you." However, this is exactly what the jury has to decide. Dean Chatfield took the documents, and they have been destroyed. So now, Defendants, are denying taking the materials and placing the integrity of the "positions they hold at issue". However, this is no reason for this Court to .believe them over Plaintiff. The jury must decide this issue. Their entire argument in a nutshell is "Plaintiff is a liar."
1. To prevent use of priors.
12. To prevent use of litigation history.
To prevent retrial of the criminal case again.
To prevent use of Taugner testimony absent disclosure of the underlying facts he gathered which were used to

form the basis of his declaration and his testimony.
To prevent use of any matter in the Martin order and his testimony absent disclosure of the facts that form the basis for the order.
To prevent Defendants from denying the allegations in the complaints set forth by Plaintiff, absent their disclosing all complaints against their employees and all executive minutes of the Board of Supervisors.
7. To prevent Defendants from arguing no complaints
were filed against them, absent employment files.
Limiting the use of defense testimony to matters not objected to by Plaintiff. In the event Defendants desire testimony on objected issues, they should disclose the facts. They should disclose all investigation conducted by the witnesses, all interviews they conducted, all conversations they had, all documents they received, created and sent, all handwritten notes regarding the subject matter of the testimonies.
Plaintiff will move in limine to exclude Defendants Exhs. 12 through 23.
To. prevent Defendants from arguing manufacturing of evidence as Judge Martin and gang entered these orders exparte and as an accommodation to Judge Schwartz, Plaintiff will move in limine to exclude this.
To prevent Defendants from arguing facts that could have been revealed had they complied with the June 20, '2003 letter Plaintiff will move in limine to exclude evidence regarding the matters set forth in the letter/arguing facts contrary to Plaintiff's position.
Defendants
Defendants .expect to file the following Motions In Limine:
Plaintiff does not have credible and admissible

evidence to support his claims.
Plaintiff fails to state claims on the basis that probable cause existed for issuance of search and seizure warrants and warrants were facially valid.
County and Board of Supervisors member Defendants have immunity and Plaintiff has insufficient evidence to proceed against them.
'Certain individual Defendants have absolute and qualified immunity to Plaintiff's claims in various Counts and certain of them had no active participation in the search and seizure and forfeiture and should be dismissed from certain Counts.
The alleged conversation between Teresa Archuleta and Robert Savage should be precluded from evidence.
• Mr. Romley is immune from suit and cannot be held liable under a respondeat superior or supervisory liability theory.
Plaintiff's Trevino v. Gates claims must be dismissed as Plaintiff has insufficient evidence and has failed to prove the necessary elements of this,. claim.
Plaintiff's abuse of process claims should be dismissed because his underlying conviction still stands and he has insufficient evidence to prove the elements of the State and Federal claims.
Plaintiff's extradition and Gerstein claims must be dismissed as he was a fugitive from justice at the time of his arrest and Defendants complied with State and Federal extradition laws.
Plaintiff's economic damage claims are inappropriate in a §1983 action and Plaintiff has insufficient evidence to proceed on those claims.
Plaintiff's retaliation claim must be dismissed for lack of evidence and failure to prove the necessary elements.
Plaintiff's common law tort claims including tortious

theft must be dismissed as he has insufficient evidence to meet the elements to prove those claims.

Plaintiff's equal protection claims, including §1985(3) claims, should be dismissed as he has admitted that he was not targeted because of his race and he has insufficient evidence to show that these Defendants had any discriminatory intent.

Plaintiff's breach of contract claim should be dismissed as they do not arise under California law, lack consideration, or void against public policy, and Plaintiff has insufficient evidence to proceed.

Plaintiff's denial of access to the ..courts must be dismissed as he fails to prove the elements and lack sufficient evidence to proceed on those claims.

Plaintiff's claims are barred by Heck v. Humphrey. Plaintiff has admitted that he is. challenging his underlying conviction.

Motions In Limine will be filed with respect to the various exhibits and witnesses listed by Plaintiff.

Defendants do note that Plaintiff has disclosed numerous names of individuals over the course of time but has never provided telephone numbers or addresses or explained how any testimony from these individuals might be relevant to this case. (See, Plaintiff's Exh. 8.)

Defendants disagree with Plaintiff's contention that his prior convictions should not be used at trial. These are admissible evidence. Because Tripati's prior convictions also involve fraudulent activity and Defendants underlying 'conviction in this case also involves fraudulent activity, his prior convictions are clearly admissible. See, United States v. Evan, 796 F.2d 264; Fed.R.Evid. 404(b). See also, Rule 609, F.R.E. regarding impeachment by evidence of conviction of a crime.

Defendants further move to preclude any evidence Plaintiff may offer regarding alleged software that was taken from his business premises by the name of "ARVITA" as Plaintiff has only as of June 2003 informed Defendants that there ever was any software by the name "ARVITA". Plaintiff has claimed that this ARVITA software is copyrighted but a search on the United States Copyright Office web site has found no such copyright.

Defendants further note that Plaintiff has failed to produce any factually specific evidence with regard to his claims for damages to-date.

Finally, Defendants expect to file Motions In Limine with respect to much of the evidence Plaintiff has offered in this case on the basis of relevance, prejudice, and failure to provide foundation.

0. PROBABLE LENGTH OF TRIAL

Five days, according to the Magistrate Judge's Report and

Recommendation filed on July 15, 2002 (Doc. No. 401) and adopted on June 10, 2003 (Doc. No. 437). Plaintiff anticipates a need for three days to present his case and Defendants anticipate a need for two days.

TRIAL DATE

Provide available trial dates after the Final Pretrial Conference for all trial counsel and witnesses.

STIPULATED PROPOSED STATEMENT OF THE CASE

The parties have been unable to agree on a proposed statement of the case. Instead, the Plaintiff's version and the defense version are submitted for the Court's review. Plaintiff

On July 1, 1992 the Los Angeles County Municipal

Court ordered Defendants to take custody of the property that was seized from Plaintiff's office by Defendants. However, the property was brought to Phoenix, Arizona on June 24, 1992 without authorization from any California judge.

Plaintiff contends Defendants manufactured probable cause to seize and forfeit his property that they filed a forfeiture and the case was decided in his favor.

According to the Plaintiff he was advised by Defendant Teresa Archuleta that Defendants would shut his business and forfeit his property, as punishment for Plaintiff challenging the policies established by Defendants, one such policy, Plaintiff contends, is targeting racial minorities for law enforcement activities.

Plaintiff states Defendant Dean Chatfield stole a software worth in excess of $40,000,000, removed other evidence and all of this was eventually destroyed by them.

Finally, Plaintiff states he was advised by Teresa Archuleta that he was targeted because he is an East Indian, a racial minority.

Plaintiff seeks damages that were caused by the conduct of the Defendants.

Defendants

This matter arises out of the arrest of Plaintiff on June 24, 1992 on charges of fraudulent schemes committed in Maricopa County, Arizona. On that same date, Plaintiff's office in Los Angeles, California was searched pursuant to two (2) search warrants issued by separate magistrates. At that time, certain of the Defendants seized property from the Plaintiff's place of business. This property was later used as evidence to convict Plaintiff of crimes for which he was

investigated and. charged.
Plaintiff claims that Defendants "targeted" him because of his race and because he was going to expose certain alleged practices and policies of Maricopa County.
Defendants categorically deny Plaintiff's allegations.

JURY INSTRUCTIONS, ETC.

Plaintiff has requested certain jury instructions and verdict forms. Defendants object to these jury instructions and verdict forms as being improper. Defendants have not submitted their jury instructions or forms of verdict yet. Defendants respectfully request that they be submitted at a more appropriate time as the parties still do not have .a trial date nor do the parties know which Counts will actually proceed to trial as against which Defendants.
Plaintiff objects to Defendants not abiding by the Court order - again as they have consistently failed to comply -they should be barred from submitting instructions.
;Also, with respect to any forms of verdict and trial memorandums of law, Defendants request that these also be submitted at a later and more appropriate time.
Regarding voir dire questions to be asked in addition to this Court's jury questionnaire, the Plaintiff's and Defendants' proposed additional. questions are being filed simultaneously with this Joint Pretrial Order.
R. MISCELLANEOUS ISSUES *Plaintiff
Defendants arguments about the Forma Pauperis Status is frivolous. Their argument as to Plaintiff's testimony is a jury issue. Their request to post bond is absurd and a vexatious tactic to prevent trial on the merits.
Defendants argument regarding manufacturing

evidence 72 should be barred as Judges Ronald Reinstein, Gregory Martin entered orders as an accommodation to Jonathan Schwartz and as these were exparte orders. Also, the contents of the orders cannot be noticed for their truth. Facts that form the orders have not been disclosed. •

Defendants are inserting "Plaintiff's criminal case" in this case, though the case is not relevant to the issues. By inserting the criminal case, they are "opening the door" to Plaintiff presenting evidence, showing the convictions are not valid. They should be barred from making these insertions.

Defendants all through this pretrial order, are arguing Plaintiff has not given any credible evidence, reliable evidence. What they are saying is that this Court should give no weight to what Plaintiff will testify to, the 801(d)(2) statements made, but give full weight to what they say. This however is a jury issue.

They are saying Plaintiff has inserted a new theory that they manufactured probable cause. They are wrong. Plaintiff states in his Fifth Amended Complaint that they searched without probable cause.

They are "misleading the. Court into believing that Plaintiff's beliefs are elements of a equal protection and 1985(3) claim." They are wrong. The law is clear that the Defendants motivation and not what Plaintiff believes is at issue.

7. Defendants argument that Plaintiff's statement be viewed with skepticism and outright disbelief is a jury issue. Dean Chatfield took all the materials and did not list them. They have withheld documents adverse to them. As they failed to provide documents what they say must be discounted under the adverse inference for failure to produce and destruction of evidence

doctrines.

Defendants

Plaintiff's Forma Pauperis Status

Defendants have filed a Motion to have Plaintiff's Forma Pauperis Status revoked based on a minute entry issued by the Honorable Edward 0. Burke of the Maricopa County Superior Court in Maricopa County Cause No. CV01-11718. Judge Burke found that Mr. Tripati had more than enough funds to cover the costs of his numerous lawsuits based on the sale of his book and revoked Plaintiff's Forma Pauperis Status.

Defendants position is supported by 28 U.S.C. §1915(d). Further, the Court is not bound by Plaintiff's economic status at the time of filing and may take into account all

relevant changes in Plaintiff's financial condition. The Court may 'retroactively require Plaintiff to pay. fees and costs if his financial. condition. has improved. Carter v. Teletron, Inc., 452 F.Supp. 939, 942 (S.D. Tex. 1976). Defendants request that Plaintiff be required to pay all costs to-date, including the initial filing fee, due to his entry.

Federal Courts have the authority to dismiss a case or, in lieu of dismissal, to require an indigent litigant to pay the full filing fee plus all costs of litigation incurred from the date of filing. See, Wiideman v. Harper, 754 F.Supp. 808, 809 (D. Nev. 1990). Further, Defendants request that Plaintiff be required to post a security bond for Defendants' taxable costs if he fails to prevail on his questionable claims at trial.

Judicial Notice Of Plaintiff's Manufacturing Evidence

Defendants also request the Court to take judicial notices of fact that other Arizona courts have determined that; Plaintiff has manufactured evidence

to support his claims (see, minute entry of Judge Gregory Martin dated November 4, 1999) and that Plaintiff's contentions should be viewed with skepticism, if not outright disbelief.

Magistrate Trial Judge

The parties have not reached an agreement to have .a Magistrate Judge preside over the trial of this matter.

APP aim A 0 FORM AND CONTENT:

Attorneys for Defendants, Gunn McKay, Dean Chatfield, Terry Blake, Donald E. Conrad, Richard Mesh, Richard M. Romley, Ronald Harris, Vincent Tolino, Gerald Grant, Estate of Teresa Archuleta, .Ed King, Betsey Bayless, Tom Rawles, Don Stapley, Mary Rose Wilcox, and Maricopa County

THIS JOINT PRETRIAL ORDER IS HEREBY APPROVED. ON THIS DAY OF JULY, 2003.

Roslyn 0. Silver S/D_____

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

)
)

ANANT TRIPATI,
Plaintiff,
vs.
GUNN McKAY, et al.,
Defendants.

NO. CV 94-170 PHX-ROS
Phoenix, Arizona September 17, 2003
2:05 p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Final Pretrial Conference)

BEFORE THE HONORABLE ROSLYN 0. SILVER

APPEARANCES:

For the Plaintiff: Anant Tripati, Pro Per

For the Defendant: Michael J. Frazelle, Esq.
Swenson, Storer, Andrews & Frazelle 2901 N. Central Avenue, Suite 1500 Phoenix, Arizona 85012

Court Reporter:

(602) 322-7245

David M. Lee
Sandra Day O'Connor U.S. Courthouse 401 W. Washington Street SPC-35 Phoenix, Arizona 85003-2150

Proceedings taken by stenographic court reporter
Transcript, prepared by computer-aided transcription
PROCEEDINGS

THE CLERK: This is CV 94-170, Anant Kumar Tripati versus Gunn McKay, et al.
Please announce your presence.
MR. TRIPATI: Anant Tripati, pro per, your Honor.
THE COURT: Thank you.
MR. FRAZELLE: Mike Frazelle for the defendants.
THE COURT: All right. Thank you.
This is the final pretrial conference, and there have been a number of motions that have been brought to my attention that need to be resolved today. I think we need to start with the most material issue, which is whether or not Heck v. Humphrey would require today for this Court to dismiss the matter.
As you both know, a motion for summary judgment was filed by the defendants, and because it was filed late, I struck it. However, the defendants were allowed to, and of course are allowed to at the time of trial, raise issues that may resolve the matter completely. I wouldn't do otherwise, because then the matter would be appealed,

and the Court of Appeals would reverse.
All right. Both sides know what Heck v. Humphrey means. Synoptically I will tell you what I believe it means, which is as follows:
If there has been a conviction in the state court or otherwise, or even in federal court, where the constitutional issue was raised and resolved against the defendant, which is inextricably interrelated to the petitioner's issue, and if that issue would resolve the matter had it been appealed and reversed by the appellate court, then there is no basis for a civil cause of action.
Is there any disagreement on that interpretation, Mr. Tripati?
MR. TRIPATI: No, your Honor.
MR. FRAZELLE: None.
THE COURT: Now in this case, Mr. Tripati, you know full well that the defendants claim that Heck v. Humphrey bars your civil lawsuit. I understand that the focus of your position on the Constitution is that there was a racially based selective prosecution. It is your position that the case, the criminal suit and conviction did not resolve -- or would not have resolved that issue had it been raised in the criminal cause of action. You rely on, ironically, the court of appeals in the state court that found the evidence was overwhelming. However, that decision that the evidence was overwhelming is not controlling, because the issue which you raise is a substantial one.
The issue you raise pertains to some of the fundamental rights, if not the fundamental rights which emanate from the Constitution, that is, that there can't be, under any circumstances, racial discrimination. It is a matter of law such that it's my

view that the issue of prejudice, or no prejudice, or harmless error could not be raised.

If it was shown in the trial court that there was racial prejudice, but the defendant was convicted anyway, then there should be a reversal. If in fact there is any connection between the cause of action or the criminal count and the conviction, based upon the allegation and the admission of evidence that showed that there was racial bias, I believe the court of appeals and actually the trial court would, of necessity, have to set aside the verdict.

I'm going to give you the opportunity, though, to expand upon what you have provided me that would establish that that issue would not be conclusive.

MR. TRIPATI: Your Honor, I believe my claims are being --

THE COURT: You may be seated, Mr. Tripati. The microphone is right in front of you, and just be seated and give me your position.

MR. TRIPATI: I believe my claims are misunderstood. I'm not asserting what the defendants and the Court believes I am. What I am saying, for example, in Counts 1, 2 and 3, is they seized my property, filed a forfeiture, and there was no basis for it. The property involved that they seized was never directly and/or indirectly used in my criminal case. I am saying that the property they seized was seized in retaliation for my challenging their actions. There is no racial factor at all involved in that.

Now, as far as Count 5 and 6, I am saying that when they took my property -- for example, Arizona authorities went on June 24th to seize my property. They were not allowed until July 1st to take control of my property by the California courts. However, they

brought my property to Arizona, according to their documents, on June 24th.
THE COURT: Let me stop you for a second. MR. TRIPATI: Okay.
THE COURT: Let's take one at a time.
I understand what you're saying. They improperly seized your property; correct?
MR. TRIPATI: Yes, your Honor.
THE COURT: And what is your position concerning whether or not that constitutes a cause of action?
MR. TRIPATI: Well, they seized it for the purpose of initiating a forfeiture, and in retaliation for my challenging them, but it had nothing to do with my criminal case at all. The seizure --
THE COURT: All right. Let me see if I understand.
What is your evidence and law that would establish that they illegally seized your property in retaliation?
MR. TRIPATI: Well, on June 24th, when they came to my office, prior to that date I had gathered a bunch of information on disks that Dean Chatfield took. The property he took --
THE COURT: Now let me stop you. How are you going to establish that by admissible evidence?
MR. TRIPATI: I saw him take it. I was in my office when he took it. I personally saw him take it. referred him to where the property -- he showed me the warrant. Attachment one to the warrant told me what property to give, what he was looking for. I said "Okay. This is here and that's there." I personally told him where it was and I saw what he took.
THE COURT: All right. So you told him and he took the property. Now what?
MR. TRIPATI: Those items were not listed in the property inventory.

THE COURT: Wait, wait, wait. I thought you said that it was within the warrant. Didn't you see the warrant?
MR. TRIPATI: I saw the warrant
THE COURT: Well, then why did you provide the property to him if you thought it was not within the four corners of the warrant?
MR. TRIPATI: No, the warrant said what he can and cannot take.
THE COURT: Well, the warrants always say what they believe to be at the place to be searched, but there is generally -- and I believe in this case -- there is a provision which allows for the officers to seize those matters which relate to the crime, which is set by probable cause in the search warrant. They are not restricted by the search -- or by what is set forth in writing and expressly in the warrant. They are allowed to seize matters within the scope of the warrant, and the matters which they seized, merely because they didn't use them at trial, does not mean that they fell outside the scope of the warrant.
Now let me go beyond that and say this to you:
In fact, law enforcement officers, many of them, do not have a legal degree. Secondly, they are not the ones who prosecute the case. That is handled by the prosecuting office. The prosecuting office works with the law enforcement agents to decide what evidence to offer.
I'm still not persuaded that merely because it wasn't listed, that it was not allowed or within the scope of the warrant.
MR. TRIPATI: Well, your Honor, it goes further than that. For example, the probable cause that he established in the affidavit that he submitted to obtain the warrant is absolutely false. There was no probable

cause to take my property, and I did not challenge that issue at all in the criminal trial. There was no connection at all with my property -- with my property and any crime at all. Every item within the affidavit of probable cause was false.

THE COURT: All right. Let me stop you.

You know, as a matter of law, under Franks v. Delaware, which is essentially what you're alleging --

MR. TRIPATI: That's right.

THE COURT: -- your first obligation, under Franks v. Delaware, is to establish a prima facie case that what the officers did in setting forth fraudulent information, which can include the failure to provide information or the omission of evidence that establishes that it would be fraudulent. That's the first obligation that you have. Then, assuming you do, the question is whether or not there is sufficient evidence to establish that you would be convicted, assuming the court suppresses that evidence. Once again, I do not see that you have met that burden.

MR. TRIPATI: Well, your Honor, in my response, in the affidavit in response to my motion in limine on the Heck issue, I address the items in the warrant that -- in the affidavit that were false. Secondly, nothing --

THE COURT: Yes, yes, yes, I know you say that, but you're going to have to prove that it's false. I don't see it on its face that it's false.

What evidence is there that not only was it false, but there was an intent to deceive the magistrate? That's what you have to show.

MR. TRIPATI: Sure. Well, in his affidavit he does not tell the magistrate that the purpose of taking the property from my office was to take evidence that I gathered from county attorney employees --

THE COURT: Wait. Was to take evidence that what?
MR. TRIPATI: That I gathered against the Maricopa County Attorney's Office and other county agencies showing wrongdoings by them. They did not have that in the warrant. That was one of the real reasons.
THE COURT: Well, wait a minute. That's speculation. You have no evidence to establish that that was their state of mind.
MR. TRIPATI: Well, if that wasn't their state of mind, why would they submit a completely false affidavit without a scintilla of evidence in that affidavit that's true, and nothing --
THE COURT: Wait, wait, wait. Mr. Tripati, you are a very knowledgeable, intelligent man. For you to use hyperbole or exaggeration is not going to get it. You cannot say that the entire warrant is false. I mean you have to be able to prove the entire warrant is false, but you are exaggerating.
MR. TRIPATI: Your Honor, for example, he is saying that my property was used to commit certain crimes in the affidavit for probable cause. My property was not used to commit any crimes, and the items --
THE COURT: Well, that's a decision that was made by the jury. That one is not going to be reviewed in a 1983 action.
MR. TRIPATI: But all the items they seized, when they filed the forfeiture, and when Judge Coughman said he will suppress all the evidence they seized, they immediately dismissed the forfeiture. They did not want the forfeiture to succeed, because Judge Coughman was going to suppress it. They did not use any item at all taken in the seizure in my conviction. Not one item taken from my office was used to convict me. Nothing from my office.

THE COURT: Now wait a minute. You're telling me that Judge Coughman suppressed the evidence because he found that it was unconstitutionally seized?
MR. TRIPATI: Judge Coughman found that I raised a viable claim for violation of the Fourth Amendment, because when they took my property -- the argument I'm making to you now, I told him the same thing. I showed him the warrants where they brought the property to Arizona without California authorization. He said "Well, brief the issues, because I find you have a viable Fourth Amendment claim." The moment he ordered the issue briefed, Mr. Harris and them said "We'll dismiss the forfeiture," and that's when they dismissed it, because they did not want to brief that issue, because Judge Coughman was going to suppress that.
THE COURT: No, that is -- Judge Coughman requested briefing?
MR. TRIPATI: Yes, your Honor.
THE COURT: Merely because the prosecutor's office decided not to use the evidence does not mean that the constitutional issue was resolved in your favor.
MR. TRIPATI: It was not resolved in my favor.
THE COURT: As a matter of fact, in reading those affidavits, I found nothing that was out of order in terms of what the officers did. Perhaps, if the officers went to California and had a warrant from Arizona, and served that warrant without the assistance of the California law enforcement officers, you would have a claim that they were -- that there was no jurisdiction. However, the affidavits establish that the officers obtained the warrant in California. The law enforcement officers in California, coupled with the law enforcement officers in Arizona actually were

responsible for and executed the search warrant. There is nothing in the law --
MR. TRIPATI: That is not correct, your Honor. THE COURT: -- that precludes that.
MR. TRIPATI: That didn't happen. I was in my office. I was there when the warrant was executed. California authorities did not execute the warrant. Dean Chatfield, Terry Blake, Jose Soto and Donald Conrad executed the warrant. No California peace officer was present at any time when the warrant was being executed.
THE COURT: The law doesn't require that they be -- there is either in fact or in law cross-designation of officers. Once the magistrate found that there was probable cause, then there was no constitutional violation of the Arizona officers to search and seize that property. They are law enforcement officers who are required, whether in Arizona or California, to abide by the Constitution. They had a valid, authorized search warrant, and they then executed that search warrant. If even everything you say is true, that there wasn't one California law enforcement officer there, that does not preclude -- pursuant to the Constitution – that does not preclude the use or suppression of that evidence. There has to be a constitutional violation. The only way there could be a constitutional violation is if in fact that warrant was unconstitutional, or the execution of the warrant was beyond the scope of the Constitution.
Now, that's not what I find.
MR. TRIPATI: Well, your Honor --
THE COURT: There is no evidence to establish that, Mr. Tripati.
MR. TRIPATI: Your Honor --
THE COURT: No, wait, Mr. Tripati.

Let me ask you this: Was the warrant issued in California?
MR. TRIPATI: The warrant was issued in California.
THE COURT: All right. Let's stop there.
Then the only claim you have is that the warrant did not set forth probable cause, number one; or two, that the execution of that warrant was somehow in violation of the Constitution. For example, if it exceeded the scope. It in fact what they seized -- I'm trying to think of a and this is not a finding, but a hypothetical -- the officers told the California magistrate that California law enforcement officers were going to execute this warrant, when in fact they knew all the time that they were going to execute the warrant; all right? Is that relevant? If the magistrate judge knew that, would she throw it out? She might get upset, she might get angry, but there is nothing in the Constitution, number one, that requires her to throw out the warrant or anything seized in conjunction with that warrant.
Secondly, assuming they specifically intended to mislead the magistrate, and that's the first requirement of Franks v. Delaware, the next issue is, assuming that to be true, is it harmless error that they seized this evidence, meaning would the suppression of this evidence, because they lied to the magistrate, affect the verdict? That's an easy one -- no -- because they didn't even use the evidence.
MR. TRIPATI: But your Honor --
THE COURT: Mr. Tripati, I'm not going to repeat this. It is already quarter to 3:00.
MR. TRIPATI: I understand, your Honor, but there is one other thing which I guess the Court is probably overlooking, and that is that when they took the items, they gave me a list of the items taken. The items that

they took, as I'm saying, they stole the items. The software, the claims against the county, they are nowhere listed in the inventory they seized. It's not listed at all. It's nowhere. They stole the items that they took.

THE COURT: Well, they seized the items. They had authority to seize the items. This doesn't mean they stole them.

MR. TRIPATI: Well, it's not listed anywhere in the property list. They are denying, after 120 months, that they took the items. Effective this year they have, for the first time, said "We did not take the software; we did not take the other items." Those items are listed nowhere on the property inventory, on the seized item list, so that shows that once somebody executes --

THE COURT: What constitutional violation is that?

MR. TRIPATI: That's a Fourth Amendment violation, your Honor. For example, there is a case, Dale v. Bartell (phonetic) --

THE COURT: Wait d minute. It is only a Fourth Amendment violation if there is harm. They didn't use it.

MR. TRIPATI: No, your Honor, but the case says --

THE COURT: It cannot be a Fourth Amendment violation if the officers didn't use it. Now if they took it from you, that may constitute a cause of action for theft, but I'm not going to consider in this federal court a cause of action for theft.

MR. TRIPATI: But your Honor, the case law says that when officers execute a warrant, and the items they take are not listed on the inventory list, and it's a theft, that is a Fourth Amendment violation. I have always said --

THE COURT: That's not what the courts hold, no,

that's not correct.
MR. TRIPATI: I can cite the case, your Honor, Dale v. Bartell, which is the case where they say that.
THE COURT: Well, you can cite that case all day and all night, but that's not what the case law holds. It's not a Fourth Amendment violation.
All right. Now what issues do you have independent of the issues that would relate to Heck v. Humphrey.
MR. TRIPATI: Well, other than Count 1, 2, 3, 5, 6 and 9, all the other counts are independent of Heck v. Humphrey
THE COURT: Now tell me why. I don't want any repetition of what we've talked about in terms of the Arizona officers executing a California warrant.
MR. TRIPATI: I understand.
For example, it all ends up with the warrant and injuring my business. The warrant is always an integral part of all my claims. The conduct in California, that is an integral part of it.
THE COURT: All right. What else? We've talked about the issue of the officers from Arizona executing a California warrant. What other improprieties do you have relating to the warrant?
MR. TRIPATI: They used the warrant, as I said earlier, to steal my property, so I have a claim for tortious theft under California law. They stole the software and the other items. They used the warrant for improper purposes in that -- I mean they abused the process, because what they did is they took --
THE COURT: By the way -- let me stop you here. These causes of action you say are California causes of action?
MR. TRIPATI: Yes, your Honor.
THE COURT: You have to have complete diversity before this Court will consider a diversity cause of

action, and there is not complete diversity in this case. There are plenty of officers who reside here in Arizona. Where is the complete diversity?
MR. TRIPATI: I am a citizen of the Fiji Islands, your Honor, I am not a U.S. citizen. I can only bring a claim in Federal Court for complete diversity. I am not a U.S. citizen at all. I maintain my home in California, not in Arizona, though I'm in prison over here.
THE COURT: All right. Go ahead.
MR. TRIPATI: There was an abuse of process claim under California law, your Honor, and the next one was the tortious theft, which I told the Court about stealing my software and other items from my office. When they did all that, they injured my business, and I had that in Counts 10 and 21.
The extradition claims, Dean Chatfield arrested me. I was in his custody, and when he realized that he arrested me, he went over and had California rearrest me, but I was still in Dean Chatfield's custody. They applied for a Governor's warrant, but they did not, with the documents submitted, advise the Governor that I was arrested by Dean Chatfield. Instead, the affidavit submitted by them for the Governor's warrant states that I am still a fugitive, and California authorities arrested me and had me in their custody, when the truth was the tape showed that Dean Chatfield arrested me.
THE COURT: Wait. Slow down.
MR. TRIPATI: The tape shows that Dean Chatfield arrested me, and he took me into his custody. He read me my Miranda rights and he said he was arresting me, and that he was an agent of the Maricopa County Attorney's Office. THE COURT: What's the constitutional violation?

MR. TRIPATI: It was a Goostin (phonetic) and a UCEA violation, your Honor.
THE COURT: Well, tell me what it is in your words.
MR. TRIPATI: My point is that he arrested me, and he had no right to arrest me in California without a Governor's warrant.
THE COURT: Well, that's not a constitutional violation. The question is whether or not there's probable cause to arrest you, and it's not a constitutional issue.
Now if someone who did not constitute a law enforcement officer conducted a civil arrest, then the civil arrest has to be in accordance with the Fourth Amendment. I suppose you could argue that the Arizona law enforcement officer was not a law enforcement officer and was conducting a civil arrest, but it still wouldn't be in violation of the Constitution.
There was probable cause to arrest you, and perhaps, under California law, it required -- the extradition statute required that the person who arrested you had to be a certified California law enforcement officer. That, again, is not a violation of the Constitution. Not the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth.
MR. TRIPATI: Your Honor, the UCEA clearly states
THE COURT: UCEA, which is California law?
MR. TRIPATI: No, it's federal law, your Honor, the Uniform Commercial --
THE COURT: Oh, okay. It says?
MR. TRIPATI: It states the state desiring to arrest a person shall have the state where the person is found, have those people arrest the person, and then go through the Governor's warrant. The Governors of both

the states. Once the Governor of the holding state authorizes extradition, then they pick him up. What they did is they arrested me first, Dean Chatfield, and then did it backwards. It's like executing at warrant -- seizing an item and getting a warrant later on. Same thing.

THE COURT: But the only issue, though, is assuming that there is a technical violation of the United States Code, the United States Code and annotated code, there is no constitutional violation, and the error is harmless. They had probable cause.

MR. TRIPATI: Well, your Honor, but --

THE COURT: They had probable cause. They had sufficient evidence to have you extradited, whether or not the wrong person picked you up.

MR. TRIPATI: Well, again, I mean the Court will say that. Under Draper v. Coombs (phonetic), Ninth Circuit case law, violation of extradition statutes give people a right to bring an independent action against the people involved.

THE COURT: You can bring an action, but not the action you're bringing, because you won't be successful on it. You can bring it, as long as it's not harmless error.

I mean what damages do you have? Do you have any damages that I'm unaware of?

MR. TRIPATI: No, your Honor.

THE COURT: You can't -- all right.

MR. TRIPATI: Not from the arrest, no.

THE COURT: All right. What else?

MR. TRIPATI: Other than that, I have an equal protection claim, and Count 19, 22, 28, 32 and 33, those are due process claims against the Maricopa County Attorney's Office.

THE COURT: And that's based upon?
MR. TRIPATI: The county attorney noL preventing his people from going outside the state and doing the types of things they did in my office, taking property and not listing them, things of that sort, your Honor.
THE COURT: There is no evidence to establish a violation by the county attorney's office. First of all, you have to have a constitutional violation, and I have not heard sufficient evidence to establish that there is a constitutional violation, that is, that the jury, taking all reasonable inferences in your favor, could find a constitutional violation.
Now, assuming there is, you have to be able to establish that there is a policy in the county attorney's office, on its face, which is unconstitutional, or that there is a custom in the county attorney's office that allows this unconstitutional violation, or that the officers are trained to commit this unconstitutional violation, or that the officers in charge, and perhaps it would be the Board of Supervisors, retrospectively, ratified the violation. You don't have any evidence of that. Again, it's speculation. You know the law, but the law doesn't fit the facts.
Now, what else?
MR. TRIPATI: That's really it, your Honor, basically. I have the Trevino v. A.F Gates (phonetic) claims, which I have against the Board of Supervisors, for paying punitive damages, but again, you would say it's harmless error.
I have then the denial of access to courts claims, where they took all the evidence from my office relevant to this. I was there when Dean Chatfield took it.
They were going to give it to me; they haven't given it to me. I believe under Lewis v. Casey, because they

took the evidence, preventing me from presenting the evidence, I have a viable access to courts claim on that.
THE COURT: Well, Mr. Tripati, I know I take some risk in doing this, but frankly, I think you already know, you do not have a constitutional cause of action based upon all the evidence that you have presented to me, and I have taken it -- I've taken it as I must, with all reasonable inferences in your favor.
Now you may, on the face of what you've told me, have a state cause of action. As I said, I'm not going to presage a ruling on that, just like Judge Coughman didn't, but what you've said could, I suppose, constitute a common law state cause of action for theft, but that's where you should be, in the state, not in federal court, because there is nothing to establish a federal court violation.
It's my understanding that most states allow or toll the statute of limitations while a matter is in federal court, if the federal court dismisses the cause of action which brought you to federal court, and declines to handle or declines to undertake the state court actions pursuant to supplemental jurisdiction.
MR. TRIPATI: Well, your Honor, in this case there is diversity jurisdiction, supplemental jurisdiction at all involved in this.
THE COURT: Well, you had a cause of action based upon 1983, and that's federal jurisdiction. The other causes of action -- I mean you can't pick and choose. Once you lose on the federal cause of action, you can't then say it's a diversity cause of action.
MR. TRIPATI: Your Honor, I always, and the Court will notice from its filings, since 1993, filed this as a diversity action originally, and it's been a diversity action all throughout. It's always been a diversity

action. It's never been a federal question action, and from California to over here, it's always been diversity.
THE COURT: Well, you can title it and claim that it's a diversity action, but it's this Court's obligation to determine whether it is, and you had federal causes of action. Now those federal causes -- I don't know, and I am speculating, but probably the 1983 -- probably it was concurrent jurisdiction and the 1983 action could have been resolved by a state court, but I don't really know because of the many issues that you have raised.
Assuming there is concurrent jurisdiction, you filed this action in federal court, and the action constitutes a federal claim. Merely because you labeled it as a diversity case does not mean that this Court doesn't have the right to dismiss it once I dismiss the diversity -- or the claim constituting a federal cause of action.
What's more, Mr. Tripati, let me just go another course on this, to insure I have covered the waterfront:
The next issue is assuming that you can, as a dual matter, raise this issue as a federal cause of action and a diversity action, but the federal cause of action is dismissed, then you still must -- you're required to establish diversity on those claims which exist. That means that they, on the face of the claims, show that you would be entitled to $75,000 or more. On the basis of those claims, I do not see that, particularly today. Today is a day where I have to consider what the evidence is to establish your loss. Your evidence to establish your loss is speculative.
MR. TRIPATI: Well, your Honor --
THE COURT: There has to be damages --
MR. TRIPATI: Well, your Honor --
THE COURT: -- whether the cause of action is filed in Arizona or it's filed in California.

MR. TRIPATI: Well, your Honor, this case was filed ten years ago.
THE COURT: I know.
MR. TRIPATI: And all this time I have asserted the same thing. With all due respect to the Court over here, the defendants took everything, took my evidence, and now all of the sudden you are telling me that there is no claim at all for some reason.
THE COURT: Well, I will tell you I've run the course with you. It is my understanding of the law that you can claim that it is a diversity action, because that certainly makes -- that certainly is going to help you now, but you have brought a civil cause of action -- I mean a federal claim cause of action. It is my understanding of the law, but I could be wrong, that once you have a federal cause of action, that is what it is. If the federal claims are dismissed, then, by supplemental jurisdiction, the Court can dismiss the other claims.
But assuming I'm wrong, assuming you can establish as a matter of law two bases for federal jurisdiction, one is based upon the federal cause of action and the other is based upon diversity, first of all, I don't see that you have alleged enough in your complaints to establish that your damages would be more than $75,000. Now that's on the complaint.
Thirdly, if I consider it, as I must today, at the final pretrial conference, as to what evidence you would offer and would be admitted to establish damages, do not find that you meet the mark. I do not find that taking all reasonable inferences in your favor, that the jury would find that there was any damage at all.
MR. TRIPATI: Are you trying to say, your Honor, that law enforcement -- in your court, law enforcement

agents can steal items from a person's office, and somebody sees the agent stealing the item, and the agent does not list it, that it's okay and there is no Fourth Amendment violation? No claim at all? No recourse at all?

THE COURT: There is no Fourth Amendment violation. I'm looking at it from the point of view of whether or not there is a state cause of action. In order to establish a state cause of action, it's really conversion.

Now, first of all, let's start with the first issue, whether or not there is conversion. Those items you voluntarily turned over. The defense to the conversion cause of action is that there was no intent to take something from somebody who did not consent to it. We don't even make it past that first issue.

Assuming that we did, that you could establish an intent circumstantially, that they intended to deprive you of this property and keep the property, and convert it to the use of the Maricopa County attorney's office, or the police office, assuming you could establish that, then you have not yet established that there is any damage.

MR. TRIPATI: But, your Honor, when I see somebody steal something from my office -- I saw Dean Chatfield take my software. I saw Dean Chatfield take the other items. How can -- I saw him take it, and it is not listed anywhere in the inventory listing. Nowhere, your Honor.

THE COURT: Now wait a minute. There has been nothing, and I don't see where you have told me or pointed to me -- we're back to where we were, Mr. Tripati, and we're arguing the same thing. As I said before, it has to be outside the scope of the warrant,

and I don't see that the seizure of these items are outside the scope of the warrant. When I say "the warrant," I mean the four corners, which means it can well exceed what is set forth in the warrant.
MR. TRIPATI: But they don't have the items. They say they lost it. They don't have it. They say they never took it. That's what they're saying now.
THE COURT: They may say that, but I'm
assuming -- as I've said, I've run the course with you. Assuming they are lying about that, you still don't have any damages. I mean you don't even have nominal damages.
MR. TRIPATI: You mean I have no nominal damages for them stealing my software and my office products that I have designed? I mean I designed it. I mean that's -- that's --
THE COURT: First of all, Mr. Tripati, you have to establish a constitutional violation from their taking it. Let's start -- and you have not shown me it's not within the scope of the warrant. Secondly, you handed it to them when they asked for it, so that's a consent.
Now we're finished with that. Anything else?
MR. TRIPATI: That's all, your Honor.
THE COURT: Let me hear from the defense. MR. FRAZELLE: I have nothing to say.
THE COURT: Well, let me, first of all, make it clear that as I stated earlier, and Mr. Tripati
addressed -- or did not address, but he did address it and certainly understood the issue, that his allegations of racial discrimination would have been outcome-determinative, because as I know Mr. Tripati knows, the Constitution has some fundamental rights. One of the most important fundamental rights in this country is that a person cannot be treated differently and

adversely based upon their race. I have no question in the law that if that issue was raised and proven in your civil case, that the matter would have to be dismissed, even if there was evidence independent to establish that you were guilty.

That is probably one of the only per se rules that, in criminal law, still exists. That means that there does not need to be proven -- well, I should say that if in fact the prosecution could prove that there was sufficient evidence to convict you independent of the discrimination, if they could establish that, then they would argue that the violation was harmless error. I don't believe harmless error applies. This is probably the only place where it doesn't apply. Racial discrimination is at the core of the Constitution, so that issue would set aside many of Mr. Tripati's issues. His independent issues I have resolved here today.

The constitutional issues he raises pursuant to 1983, he has not established that there is sufficient evidence to be submitted to the jury for them to determine that there was a constitutional violation, taking into account all reasonable inferences in his favor.

Independently, assuming that he does have independent jurisdiction based upon diversity, the Court does not find, taking all reasonable inferences in his favor, that there is enough evidence that has been set forth in the complaint to establish that he has met the jurisdictional requisite of $75,000. Assuming that he does, the Court does not find that the evidence is sufficient for the, jury to find that there was conversion by the officers or by the county.

For the reasons previously stated, there is no conversion by the county, because there is no evidence that the officers converted -- the officers independently

converted the evidence and took the evidence away from Mr. Tripati, and that the county endorsed the violation, which would be a state cause violation, or state cause of action.

I believe that resolves all the issues. The other issue he raised, which I have resolved, is whether or not -- there's two issues, I guess, a state cause of action, because the officers -- a state or constitutional violation -- because the officers, taking everything he says as true, who executed the warrant misled the magistrate and said that the California officers were going to execute the warrant, when in fact they executed the warrant.

That statement is not -- or their deception, assuming it's true, does not constitute a federal cause of action, because, pursuant to Franks v. Delaware, it is completely irrelevant. The evidence that Mr. Tripati is complaining about was not used at trial.

Now independently of that, the issue of whether or not they improperly seized -- exceeded the scope of the warrant has not been established. Mr. Tripati has stated these items were not listed in the warrant, and as I have explained, the items do not necessarily -- do not necessarily need to be listed in the warrant. The question of the scope of the warrant is whether they exceeded the scope of the warrant in seizing the items.

I will tell you, I don't have the case right in front of me, but this issue was decided long ago by the Supreme Court of the United States. It is probably a 20-year-old decision, so I think it was under the Warren court where they held that anything, any item, any evidence that could -- not does, not that it would, but that could establish an instrumentality, or instrumentality of the crime, or it could lead to admissible evidence, that's

how broad the scope requirement is under the Constitution.
Finally, with respect to the state causes of action, the Court finds that Mr. Tripati, our petitioner, has not established sufficient evidence for the jury to find conversion as a state matter, and sufficient evidence to establish a state cause of action for violation of the extradition law.
I believe that's all the causes of action. Therefore, I am granting, if the government -- or if defense counsel is moving, a Rule 50 motion.
Are you?
MR. FRAZELLE: In light of today's proceedings, we do, your Honor.
THE COURT: The motion for judgment as a matter of law, made by defense counsel, is granted.
Now Mr. Tripati, you obviously know you have a right to appeal. This is a civil matter, so my understanding is that you have 30 days from today to appeal. I strongly urge you, when you do appeal, to make it very clear what you are appealing from.
I know you understand that you are not entitled to, except under the rarest of circumstances, to have a lawyer on appeal, and I don't know how they handle the transcript, frankly, but you may not even be entitled to the transcript. If you are, you might need to pay for a portion of it, and then the remainder is captured by the government later.
All right. Having heard and considered all the evidence presented before this Court, all the legal arguments made, this matter is adjourned.
I'm going to ask defense counsel to prepare an appropriate order and judgment. This matter is adjourned. MR. TRIPATI: Thank you.

MR. FRAZELLE: Thank you.
(The proceedings adjourned at 3:11 p.m.)

CERTIFICATE
I, David M. Lee, CSR 9543, RMR, CRR, Official Court Reporter, hereby certify that pursuant to Section 733, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.
Signed this 23rd day of November, 2003.
David M. Lee, CSR 9543, RMR, CRR Official Court Reporter

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04-17148

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Anant Kumar Tripati, Plaintiff, vs. GUNN MCKAY ET AL; Defendants,	MOTION TO RECALL MANDATE

MOTION TO RECALL MANDATE
INITIAL EN BANC SUBMISSION
REQUESTED- DECLARATION OF COUNSEL

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203 F.3D 914, 917-18 (9TH CIR. 2000)
WILLIAMS V. UNITED STATES,
307 F.2D 366 (9TH CIR. 1962)
ZACHARIA V. HARBOR ISLAND SPA INC, 684 F.2D 199, 202 (2ND CIR. 1982)

INTRODUCTION 1

Counsel believes the panel decision to deny the first motion to abate time violates the "learning, goodsense, fairness, and courage" provisions of McNABB V. UNITED STATES, 63, S. Ct 608,
616 (1943) and raises "grave Constitutional overtones" GRUNEWALD V. UNITED STATES, 77 S. Ct. 963 (1957). For it did not apply "proper standards" MARSHALL V. UNITED STATES, 79 S. Ct. 117 (1959) in deciding this appeal as fully set forth, the petition for rehearing and suggestion for hearing EN BANC lodged within the court on December 29, 2006 [Exhibit 3].

As the panel decision affirming the District Court does not present a clear statement of it's reasoning, it leaves "an abiding impression from a reading of the entire record" OFFUTT V. UNITED STATES, 348 U.S.

11(1954)(internal text omitted for emphasis) that the panel instead of reading the record did adopt what the Defendants argued2.

Specifically, the panel decision that there was no judicial bias offends LITEKY V. UNITED STATES, 510 U.S. 540, 554 (1994).

Because "bias from an extra- judicial source is not a pre-requisite for judicial disqualification" and the conduct of the Judge Barry Silverman is disqualified as he was the Magistrate Judge. Exhibit 6 is a Motion to Recall the Mandate in Tripati's Habeas. As this Court may judicially notice it's own records, it should take judicial notice of the fact that Ninth Circuit Panels are not affording Tripati a meaningful Appellate Review by affirming decisions without reviewing the record.

District Judge clearly constitutes judicial bias [Exhibit 3 pages 2 to 5].

By failing to meaningfully review the record, the panel failed to realize that there is absolute and total absence of evidence showing that the property was used to obtain the convictions against Tripati. Because the property was stolen and

not listed in the inventory, this conflicts with Harvey V. Waldron, 210 F.3d 1008 (9th.Cir. 2000), [Exhibit 3 pages 5-10]. Admissions pursuant to Rule 801 (d) (2) constitute sufficient evidence and arguments of Counsel are not evidence. The panel overlooked this thereby acting contrary to RIGGINS V. RIGGINS,

415 F.2D . 1259, 1260-61(9TH.Cir.1969); UNITED STATES V. STEPHENS, 203 F.3D 914, 917-18 (9TH.Cir. 2000). Tripati's uncontroverted affidavits opposed by only arguments of Counsel, is sufficient

evidence [Exhibit 3 pages 5-10]. Finally, the panel did commit structural error in the Appellate process

because under the facts of this case the standard of review should have been the summary judgment standards [Exhibit 3 pages 10-14]because directed verdicts cannot be granted at the Final Pretrial Conference ARIZONA V. FULMINANTE, 111 S. Ct. 1246,126 5 (1991).

JURISDICTION

NEWHOUSE V. ROBERTS ILIMA TOWERS, INC. 708 F.2D 436 (9111.Cir. 1983); WILLIAMS V. UNITED STATES, 307 F.2D 366 (9TH Cir. 1962); AND RIVERA V. UNITED STATES, 477 F.2D 927 (3c'n.Cir. 1973) sets forth the criteria for Recalling Mandates. The criteria is "inadvertence" or excusable neglect" and when the movant shows the Appellate Court's decision is based on mistake of fact. On December 29, 2006, Appellant filed Exhibit 3 and that petition clearly shows that the mandate must be recalled. Tripati has shown manifest injustice in this matter.

STATEMENT OF FACTS

ON November 7, 2006- 4 days after the panel decision-Counsel moved to abate time for 60 days, to review the record which is extensive, to confer with his client in Arizona State prison, and to file for rehearing [Exhibit 1]. The petition was lodged within the 60 days [Exhibit 3].

On January 12, 2007, Counsel received the October 20, 2006 panel order denying the motion to enlarge time. Counsel moved to reconsider that order [Exhibit 2].

Defendants moved to strike the petition as being untimely [Exhibit 4] and Counsel objected [Exhibit 5].

On February 9, 200? Counsel received the mandate [Declaration).

THE PANELS ORIGINAL ERRONEOUS DECISION SUBJECT THE LODGED PETITION

The panel overlooked the fact that Judge Roslyn Moore Silver functioned as the lawyer for the defendants when she:
Advocated the position taken by the defendants and prevented Tripati from making a record by refusing to let him answer her questions fully [Transcripts September 17th, 2003 Vol. 4 E.R. 86 pp]; Directed defendants to orally move for Rule 50 relief which she granted [Vol.4 E.R. 86, 1173 lines 19-20];
(3). Disregarded the motions in liminie she had ordered the parties to file [Vol.1 E.R. 22, 13, 14, 15, 18-21, 23-to Vol.4 E.R. 73, Vol. 5 E.R. 94]; Disregarded prior admonitions that defendants not engage in sloppy lawyering [Vol.1 E.R. 1 p2 F.N. 1 and 2]; Disregarded defendants refusal to comply with judicially adopted stipulations [Vol.1 E.R. 2, 3];
Considered previously rejected arguments without the addition of new facts [Vol.1 E.R. 4 to 8];
Disregarded the motion to reconsider [Vol.4 E.R. 80] reply [Vol.4 E.R. 85] supplemental briefs [Vol.4 E.R. 88, Vol.5 E.R. 90]; (8). Failed to provide a clear statement of her reasoning on the record for her decision [Vol.4 E.R. 87, Vol.5 E.R. 91, 92]which is in conflict with the way Judge Silver has previously
functioned when acting as an unbiased judge [Vol.1 E.R. 4 to 11]. She has always given a thorough analysis for her decision when unbiased;
(9). Before transferring the motion to recuse for judge Roger Strand to consider, she decided both on the facts and reasons advanced for her disqualification, which Judge Roger Strand
adopted [Vol.4 E.R. 87].
MATERIAL FACTS OVERLOOKED BY THE PANEL:
The property seized was not listed in the inventory

[Vol.4 E.R. 86 pp 1137 line 22-23].
The property had nothing to do with his convictions [Vol.4 E.R. 86 pp 1136 line 24 to 1138, line 1] and had nothing to do with the criminal case [Vol.4. E.R. 58; Vol.4 E.R. 86 pp 1149 line 1 to 6; E.R. 57 pp 934; 58 pp 936 to 939; E.R. 63 pp 973; 68 pp 991; 69 pp 997 to 999; E.R. 70 pp 1000].
(3) There is "absolutely nothing in the records which shows that the property seized, but not shown as an item in the inventory list, had anything to do with the conviction."
The panel relying on HARVEY V. WALDRON, 210 F.3D 1008 (9th Cir. 2006) states because evidence obtained in the allegedly illegal search and seizure was used for his conviction" [memo pp. 2] they were HECK barred.
This is based on the panel overlooking material facts.
Additionally, the record does not support this. The record reflects the items had nothing to do with the convictions. In HARVEY, "the evidence seized in the allegedly unlawful search-gaming devices-was an essential element of the crime of which HARVEY was charged-illegal possession of gaming devices."
This case is distinguishable on the facts because:
The property was not listed in the inventory [Vol.4 E.R. 86 pp 1137 line 22-23].
The property in no way, form or manner implies the validity of Tripati's convictions 1\1°1.4 E.R. 58 pp 936].
(C) The evidence was not used in the criminal case [Vol.4 E.R.58 pp 935-939, E.R. 51 to 71, 73; 74; 75].
As the elements of Tripati's crimes "do not involve the property" the panel decision is in error and conflicts with HARVEY (SUPRA); OVE V. GWINN, 264 F.3D 817 (9th Cir. 2001); CABRERA V. HUNTINGTON

PARK, 159 F.3D 374 (9th Cir. 1998). The panel overlooked material facts.

In pages 8 to 24 and 27 to 30 of his brief- Tripati-with the record fully supporting Tripati, has argued that:

The amount in controversy, excluding interest and costs, exceeded $75,000 [Opening brief pp 8-10].

There was no voluntary relinquishment of the property [id pp 10-13].

The 801(d)(2) statements were substantive evidence [id pp 13-15].

The court erred in making credibility determinations [id pp 15-25].

Arguments of Counsel are not evidence and as Tripati submitted affidavits to support his assertions the trial court was in error [id pp 27-28].

A FRANKS hearing should have been held [id pp 28].

LAW OVERLOOKED BY THE PANEL:

The court must show that the court engaged in "meaningful consideration of [the] question" METROPOLITAN LIFE INS. CO V. USERY, 426 F. Supp 1560, 171 (D. D.C. 1976). Unfortunately the panel decision does not reflect this.

(1) Tripati with his sworn and uncontroverted affidavit showed the value of the property exceeded $75,000, exclusive of interest and costs [Vol. 4 E.R. 10 pp 77; E.R. 26 pp 218 para 37; Vol. 4 E.R. 68 pp 991; 69 pp 998-999; 63 pp 972-973; 74 pp 1029-1031; 53 pp 919 para 26].

Tripati's affidavits constituted sufficient evidence as to the value of the property ZACHARIA V. HARBOR ISLAND SPA, INC., 684 F.2D 199, 202 (2nd Cir. 1982).

The panel decision is based on material facts being overlooked and conflicts with RIGGINS V. RIGGINS,

415 F.2D 1259, 1260-61 (9th Cir. 1969). Defenses asserted by defendants should not have been considered, RIGGINS.

Tripati swore under oath that he saw Defendants take the property under false pretenses [Vol. 4 E.R. 76 pp 1081, 1085; E.R. 69 pp 998-999; 68 pp 991; 63 pp 972-973; 67 pp 987]. The panel's decision that defendants showed otherwise is based on material facts being overlooked and UNITED STATES V. STEPHENS, 203 F.3D 914, 917-18 (9th Cir. 2000) states, there is no consent when there is mis-representation of authority. Tripati swore the warrant did not allow taking of the property missing [Vol. 4 E.R. 68 pp 991; E.R. 74 pp 1029-1031, 1022, 1024-25; E.R. 75 pp 1074-84) and nothing controverts this. CASE V. KITSAP COUNTY SHERIFF'S DEPT, 249 F.3D 921 (9th Cir. 2001) is in conflict with the panel decision based on the panel overlooking material facts.

(4) Tripati filed an affidavit setting forth 801(d)(2) statements made by Defendant Archuleta [Vol. 4 E.R. 61 pp 950-964) and also addressed these in the response to defendants JMOL [Vol. 4 E.R. 74 pp 1022; 75 pp 1079-1084) which the court supposedly did consider [memo at 5 "there is no basis in the record ... that the District Court refused to admit statements of Teresa Archuleta.").

The panel decision conflicts with ALEXANDER DAWSON INC. V. NCRB, 586 F.2D 1300, 1302 (9th Cir. 1978) because the Jury and not the court makes "its own determination of the authenticity of the admitted evidence and the weight it feels the evidence should be given."

"Even if a District Court believes the evidence is insufficient to prove the ultimate point for which it is

offered, it may not exclude the evidence if it has the slightest probative value" DOUGLASS V. EATON CORP, 956 F.2D 1339, 1344 (9th Cir. 1992). As the statements were contrary to defendant's position, the District Court and the panel erred in finding this was insufficient evidence UNITED STATES V.
MATLOCK, 415 U.S 164, 172 (1974).

The panel overlooked material points of law on the admissibility of 801(d)(2) statements and the decision conflicts with UNITED STATES V. MATLOCK, 415 U.S. 164, 172 (1974). Tripati does not have to have first hand knowledge of 801(d)(2) statements made by defendant Archuleta MAHLANDT V. WILD CANID SURVIVAL & RESEARCH CTR, 588 F.2D 626, 630 (8th
Cir.1978).

The entire case can be based on the testimony of only one witness-Tripati or Archuleta- IN RE BEVERLY HILLS FIRE LITIGATION, 695 F.2D 1207 (6th Cir. 1982). In this matter, this material point of law was overlooked by the panel.

The panel overlooked the fact that Tripati did request a FRANKS hearing (Vol. 4 E.R. 71, 73; E.R. 69 pp 997 to 999; E.R. 70 pp 1000-1007] and set forth in his affidavit that the probable cause was manufactured [Vol. 4 E.R. 86 pp 1139 lines
4-12; 1141 lines 1-15].

(a) The District Court held the final pretrial conference and Tripati filed his objections, affidavits and exhibits, as ordered [Vol. 1 E.R. 13, 14, 15, 18, to 21, 23 to 73, Vol. 5 E.R. 94].

The District Court relied on only the arguments of Counsel [Vol. 4 E.R. 76] as defendants submitted no evidence.

The District Court did not grant a motion pursuant to Rule 52 applying 56 standards; The District Court granted Rule 50 relief in the pretrial conference.
The District Court granted Rule 50 relief in the pretrial conference.
The standard for Rule 56 relief is different from Rule 50. For Rule 56 relief -the Court must determine whether there are triable issues of material fact OLIVER V. KELLER, 289 F.3D 623, 626 (9th Cir. 2002). The trial jury and not the court decide the authenticity of evidence ALEXANDER DAWSON INC. V. NLRB, 586 F.2D 1300, 1302 (9th Cir. 1970).
During Final Pretrial Conference, the trial Judge cannot make credibility determination of the evidence IN RE EXXON VALDEZ, 270 F.3D 1215, 1237 (9th Cir. 2001) as in this case.
As plaintiff made a jury demand, findings pursuant to Rule 52 and not Rule 50 should have been made BURGER V. NEW YORK INSTITUTE OF TECHNOLOGY, 94 F.3D 830, 832-833 (2nd Cir. 96)
When Rule 50 relief is granted, courts "assume the veracity of the evidence submitted by plaintiff through his affidavits", ARBAN V. WEST PUB, 345 F.3D. 390, 400 (6th Cir.2003).
Arguments of Counsel are not a substitute for evidence. S. A. EMPRESS DA VIACAD AEREA RIO GRANDENSE V. WALTER KIDDE & CO, 690 F.2D 1235 (9th Cir. 1980).
(1) During the Final Pretrial conference, summary judgment standards must be applied PORTSMOUTH SQUARE HOLDERS PROTECTIVE COMMITTEE, 770 F. 2D 866, 869 (9th Cir. 1985)
When there are disputed issues, they "require a jury -to resolve the parties differing versions of the truth"

AYDIN CORP V. LORAL CORP, 718 F.2D 897, 902 (9th Cir.1983).

A Rule 50 motion can only be granted after all the evidence is presented McSHERRY V. LONG BEACH, 423 F.3D 1015 (9th Cir.2005).

In the trial court, ARIZONA V. FULMINANTE, 111 S. Ct. 1246, 1265 (1991) holds "structural defects in the constitution of the trial mechanism, --defy analysis by "harmless-error" standards." However, it is logical to extend this principle, to those situations, where, as in this case, Appellate Panels do not engage in a meaningful review of the record, thereby denying meaningful Appellate consideration.

The District Court in this case applied Rule 50 and not Rule 56 standards, which is never harmless because of different standards of appellate review.

The Panel overlooked material issues of facts and law, as set forth in this petition, which is never harmless. Meaningful Appellate review requires the panel to review the record and engage in a meaningful consideration of the issues, which, was apparently not done in this case, by this panel. According to McNABB V. UNITED STATES, 63, S. Ct 608, 616 (1943) "learning, goodsense, fairness, and courage" is essential for the fair administration of justice. The action of this panel and three other panels in footnote 1, raises "grave constitutional overtones" GRUNEWALD V. UNITED STATES, 77 S. Ct. 963 (1957). The Ninth Circuit panel, Counsel believes, are not reviewing the record meaningfully and not properly applying established law, to cases in which Tripati is a party. EN BANC review is necessary to ensure the application of "proper standards"

MARSHALL V. UNITED STATES, 79 S. Ct. 117

(1959). Tripati has the right to meaningful review.

THE MANDATE SHOULD BE RECALLED AS TRIPATI HAS SHOWN EXCUSABLE NEGLECT AND THAT THE APPELLATE COURT'S DECISION IS BASED ON MISTAKE OF FACT RESULTING IN MANIFEST INJUSTICE.

When a litigant acts with diligence, that litigant satisfies the criteria for excusable neglect. In ROGERS V. WATT, 772 F.2D 456 (9TH.Cir. 1983) this court found excusable neglect as "Counsel diligently had his secretary repeatedly check" in this case:

4 days after the panel decision, Counsel moved to abate time for 60 days because of the volume of the record and as Tripati is in Arizona [Exhibitl].

Counsel on December 29, 2006 filed the petition [Exhibit 3].

Upon receipt of the order denying the motion to enlarge time, Counsel moved to reconsider [Exhibit 2].

Defendants moved to strike the petition for rehearing and Counsel responded [Exhibit 4, 5].

These factors clearly show excusable neglect [Declaration of Counsel].

In this case the panel did not apply the "proper standards" MARSHALL V. UNITED STATES, 79 S. Ct. 1171 (1959) when deciding the appeal on the merits as outlined in the petition for rehearing [Exhibit 3].

Similarly, the panel did not exercise its "learning, goodsense, fairness, and courage" McNABB V. UNITED STATES, 63, S. Ct 608, 616 (1943 as it failed to consider the volume of record and the fact that Tripati is in Arizona, which is why the extension [Exhibit 1] was requested.

Furthermore, the motion in Exhibit 6 and the reasons for rehearing in this case [Exhibit 3] does clearly raise "grave Constitutional overtones" GRUNEWALD V. UNITED STATES, 77 S. Ct. 963 (1957) because Tripati has shown that the Ninth Circuit is not affording Tripati meaningful appellate review, but affirming decisions without reviewing the record. Tripati must be afforded meaningful appellate Review [Declaration 8]. This court should recall the mandate and direct this case be heard EN BANC.

Respectfully submitted,
Dated Day of February 007.
California ate Bar N0.92423

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email:romerolawfirm@yahoo.com
Attorney for Plaintiff, Anant Kumar Tripati

DECLARATION OF FREDERICK A. ROMERO

I, Frederick A. Romero, duly sworn upon oath declare under penalty of perjury that the following facts are true and correct and I am competent to testify:

I am an attorney duly licensed to practice law before the State of California and the United States District Court and the Ninth Circuit Court.

The Appellate Panel in this case, I believe did not meaningfully review the record as has been fully set forth by me in the Petition for Rehearing and suggestion for hearing EN-BANC marked Exhibit 3.

As the record in this case is a voluminous record and as Mr. Tripati is in Arizona, I filed a timely Motion to Abate time, marked Exhibit 1, asking for 60 days to file petition.

Within 60 days I lodged the petition marked Exhibit 3, and that petition clearly shows the Panel decision is clearly in error.

The Panel denied by order of December 20th, 2006 my motion to abate time. I received that order on January 12, 2007 and on January 17, 2007 I sought Reconsideration of that order, Exhibit 2.

Defendants moved to strike my Petition for rehearing and I submitted my Objections Exhibit 4, 5. On January 11, 2007 the Mandate was issued in this matter. I received the Mandate on February 9, 2007.

I am of the opinion that the Ninth Circuit Court is not reviewing the record in Appeals filed by Tripati. I base this on the following facts:

(a) In Exhibit 6, this Circuit affirmed an order denying Habeas relief. As I have set forth in that Exhibit, the Panel did not have the District Court file and reviewed something else

(b) A Second Panel affirmed a decision on March 30,

2005. However, the record was with the Justice Department in Maryland. (e) A Third Panel affirmed a decision on February 28, 2006. However, the record was in the District Court (d) The Fourth Panel which is the Instant Panel also did not review the record as stated in Exhibit 3.

9, I ask that the mandate be recalled and this matter be heard EN BANC.

The decision of the Panel has resulted in manifest injustice.

This request is not for the purpose of delay or any improper purpose.

Executed in Los Angeles, California on February, 1 2007

FRICK A. ROMERO, ESQ

California State Bar No. 92423 Post Office 70662
Pasadena, California 91117
(213) 880-0924 romerolawfirm@yahoo.com
Attorney for Plaintiff, Anent Kumar Tripati

CERTIFICATE OF COMPLIANCE

This is to certify that this motion is double-spaced, uses a proportionately spaced typeface (Courier, font 12) and contains 14 pages of text.

Dated February / 2007

CK . ROMERO
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Frederick A. Romero, Esq P.O. Box 70662
Pasadena, California 91117 (213) 880-0924
04-17148

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO ABATE TIME

Counsel request he be given 60 days from the date of this request to move for rehearing and / or hearing EN-BANC plaintiff Mr. Tripati is in prison in Arizona. Prior to moving for rehearing or hearing EN-BANC, o,ounsel has to confer with Mx. Tripati hence this request.
This request is not made for the purpose of delay or any improper purpose.

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Email: romerolawfirnt@yahoo.com
04-17148
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Anant Kumar Tripati,)

MOTION FOR LEAVE TO FILE DELAYED MOTION TO RECONSIDER DUE TO DELAYED RECEIPT OF MOTION TO RECONSIDER ORDER OF DECEMBER 2 0 , 2006.

Counsel for the reasons in his declaration asks the court to allow this delayed filing and grant his motion.
On December 20th, 2006, this panel denied the motion

to enlarge time. Counsel asks that the order be reconsidered for these reasons:

As the record is voluminous and plaintiff, Tripati is in prison in Florence, Arizona, Counsel sought 60 days to review the decision and record; discuss the matter with Tripati and file the petition.

On December 29th, 2006 that petition was filed [Ex A].

(3) A review of the petition filed shows that the Appellate panel did not meaningfully review the record in this case.

Tripati did not seek delay for any improper purpose.

CONCLUSION

The Appellate panel did not meaningfully consider this appeal, It erred in denying that motion to enlarge time. Counsel asks that the petition received on December 29th, 2006 be ordered filed. The interest of justice so mandates.

Dated January 17, 2007

Attorney for Plaintiff Anant Kumar Tripati

Declaration of Frederick A. Romero

I Frederick A. Romero duly sworn upon oath declare under penalty of perjury that the following facts are true and correct and / am competent to testify:
I am an attorney duly licensed to practice law before the State of California and before the Federal District and Appellate Court.
On January 12, 2007 I received December 20th, 2006 order denying my motion to abate, hence this delayed request.
3 . Because of the voluminous record and as Mr. Tripati is in Arizona, I sought 60 days to file for rehearing.
On December 29th, 2006 I filed the attached petition for rehearing which clearly shows the panel decision is in error.
To prevent manifest injustice, I ask the court reconsider its order and direct the petition submitted be filed.
6 . This request is not for the purpose of delay or any improper purpose.
A. ROMERO, ESQ California State Bar No. 92423 Post Office 70662
Pasadena, California 91117 (213) 880-0924 romerolawfirrn@yahoo.com
Attorney for Plaintiff
Anant Kumar Tripati

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US COURT APPEALS
9th CIR CLERK

04-17148

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Anant Kumar Tripati, Plaintiff, vs. GUNN MCKAY, ET AL. Defendants,	)

PETITION FOR REHEARING AND SUGGESTION POR HEARING EN BANC

FREDERICK A. ROMERO, WO CALIFORNIA STATE BAR NO. 92423

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ATTORNEY FOR PLAINTIFF
ANANT KUMAR TRIPATI

FIRST REASON FOR RELIEF
THE PANEL DECISION THAT THERE WAS NO JUDICIAL BIAS, HAS NO BASIS IN THIS RECORD, IS BASED ON THE PANEL MISAPPLYING THE LAW, OVERLOOKING MATERIAL PACTS AND CONFLICTS WITH DECISIONS BY THIS COURT.

MATERIAL FACTS OVERLOOKED BY THE PANEL

The panel overlooked the fact that Judge Roslyn Moore Silver functioned as the lawyer for the defendants when she:

Advocated the position taken by the defendants and prevented Tripati from making a record by refusing to let him answer her questions fully (Transcripts September 17th, 2003 Vol. 4 E.R. 86 pp);

Directed defendants to orally move for Rule 50 relief which she granted [Vol.4 E.R. 86, 1173 lines 19-20);

Disregarded the motions in liminie she had ordered the parties to file [Vol.1 E.R. 22, 13, 14, 15, 18-21, 23-to Vol.4 E.R. 73, Vol. 5 E.R. 94);

Disregarded prior admonitions that defendants not engage in sloppy lawyering [Vol.1 E.R. 1 p2 F.N. 1 and 2); Disregarded defendants refusal to comply with judicially adopted stipulations (Vol. 1 E.R. 2, 3);

Considered previously rejected arguments without the addition of new facts (Vol. 1 E.R. 4 to 8); judicial reform have been proposed, again [Exhibits A, B, Cl. Counsel believes the panel decision, posted on www.ARVITALAW.com must be revisited.
Disregarded the motion to reconsider [Vol. 4 E.R. 80) reply [Vol. 4 E.R. 85] supplemental briefs [Vol. 4 E.R. 88, Vol. 5 E.R. 90]; Failed to provide a clear statement of her reasoning on the record for her decision (Vol. 4 E.R. 87, Vol. 5 E.R. 91, 92] which is in conflict with the way Judge Silver has previously functioned when acting as an unbiased judge [Vol. 1 E.R. 4 to 11). She has always given a thorough analysis for her decision when unbiased;
(9). Before transferring the motion to recuse for Judge Roger Strand to consider, she decided both on the facts and reasons advanced for her disqualification, which Judge Roger Strand adopted (Vol. 4 E.R. 87).

ARGUMENT

The panel does not present clear statement of the reasoning for its decision United States v. Zimmerman, 943 F. 2d 1204, 1212 (10th CIR. 1991) and leaves "an abiding impression from a reading of the entire record" Offutt v. United States, 348 U.S.
11 (1954) (internal text omitted for emphasis) that the panel did not read the record, instead adopting what defendants argued as shown below.
(A) "Bias from an extra-Judicial source is not a pre-requisite for judicial disqualification" Liteky v. United States, 510 U.S. 540, 550 (1994). The panel overlooked the record in this case which, as outlined in paragraph 1 to 9 above, shows Judge Silver's actions fit clearly within the Liteky parameters at 510 U.S. 555 (finding

bias for favorable or unfavorable opinion as a result of facts or events during the proceedings showing deep seated favoritism). The panel decision conflicts with Liteky.

(B) "Whether a reasonable person with knowledge of all these facts would conclude that a judge's impartiality might reasonably be questioned" Mayers v. Leipziger, 729 F.2D 605, 606-07 (9th Cir. 1984) is the standard. It is generally known

that an "average person on the street" who is not a lawyer is the test Moran v. Clarke, 296 F.3D 638, 648 (8th Cir. 2002).

Since judicial insiders are accustomed to the process of dispassionate decision making and are keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, they may regard asserted conflicts to be more innocuous than an outsider would United States v. DeTemple, 162

F.3D 279, 287 (4th Cir. 1998).

The panel overlooked the facts in this regards, as set forth in paragraph 1 to 9, above. Its decision conflicts with Mayers, (Supra); Moran, (Supra); DeTemple, (Supra); and Liteky, (Supra).

(C) Berger v. United States, 255 U.S. 22 (1921) states "to commit to the judge a decision upon the truth of the facts gives Chance for the evil against which the section is directed" and United States v. Montecalvo, 545 F. 2D 684, 685 (9th Cir. 1976) forbids a judge from deciding "on the facts and reasons" advanced for disqualifying the judge.

Judge Silver after deciding on the facts asserted for her disqualification, transferred the matter to Judge Roger Strand for his decision (Vol. 4 E.R. 87].

The panel decision to uphold this offends Montecalvo and Berger.

(D) "When the trial Judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume the process was impaired" Vasquez v. Hillery, 474 U.S. 254, 263 (1986). The panel decision conflicts with Vasquez because, Judge Silver, acting as defense counsel changed all prior decisions made by her and engaged in the acts in paragraph 1 to 9. Such actions reflect very poorly on the integrity of federal courts, especially when upheld by Appellate judges.

SECOND REASON FOR RELIEF

THE PANEL DECISION THAT THE CLAIMS ARE HECK BARRED HAS ABSOLUTELY NO SUPPORT IN THIS RECORD, IS BASED ON MATERIAL FACTS AND LAW OVERLOOKED AND CONFLICTS WITH HARVEY V. WALDRON, 210 7.3D 1008 (9TH CIR. 2000).

MATERIAL FACTS OVERLOOKED BY THE PANEL:

(1) The property seized was not listed in the inventory (Vol. 4 E.R. 86 pp 1137 line 22-23].

The property had nothing to do with his convictions [Vol. 4 E.R. 86 pp 1136 line 24 to 1138, line 1) and had nothing to do with the criminal case (Vol. 4. E.R. 58; Vol. 4 E.R. 86 pp 1149 line 1 to 6; E.R. 57 pp 934; 58 pp 936 to 939; E.R. 63 pp 973; 68 pp 991; 69 pp 997 to 999; E.R. 70 pp 1000].

There is "absolutely nothing in the record which shows that the property seized, but not shown as an item in

the inventory list, had anything to do with the conviction."

ARGUMENT

The panel relying on HARVEY V. WALDRON, 210 F.3D 1008 (9th Cir. 2006) states because evidence obtained in the allegedly illegal search and seizure was used for his conviction" [memo pp. 2] they were HECK barred.

This is based on the panel overlooking material facts and the record does not support this. The record reflects the items had nothing to do with the convictions.

In HARVEY, "the evidence seized in the allegedly unlawful search-gaming devices-was an essential element of the crime of which HARVEY was charged-illegal possession of gaming devices."

This case is distinguishable on the facts because:

The property was not listed in the inventory [Vol. 4 E.R. 86 pp 1137 line 22-23].

The property in no way, form or manner implies the validity of Tripati's convictions (Vol. 4 E.R. 58 pp 9361.

(C) The evidence was not used in the criminal case [Vol. 4 E.R.58 pp 935-939, E.R. 51 to 71, 73; 74; 75].

As the elements of Tripati's crimes "do not involve the property" the panel decision is in error and conflicts with HARVEY (SUPRA); OVE V. GWINN, 264 F.3D 817 (9th Cir. 2001), CABRERA V. HUNTINGTON PARK, 159 F.3D 374 (9" Cir. 1998). The panel overlooked material facts.

THIRD REASON FOR REVIEW

THE PANEL DECISION THAT DEFENDANTS OFFERED OVERWHELMING EVIDENCE IS

ABSOLUTELY FALSE, IS A MIS-STATEMENT BY THE PANEL OF THE RECORD IN THIS CASE AND CONFLICTS WITH CIRCUIT PRECEDENT.

BACKGROUND

In pages 8 to 24 and 27 to 30 of his brief- Tripati-with the record fully supporting Tripati, has argued that:
The amount in controversy, excluding interest and costs, exceeded $75,000 [Opening brief pp 8-10].
There was no voluntary relinquishment of the property [id pp 10-13). The 801(d)(2) statements were substantive evidence (id pp 13-15]. The court erred in making credibility determinations [id pp 15-25]. Arguments of Counsel are not evidence and as Tripati submitted affidavits to support his assertions the trial court was in error (id pp 27-28). A FRANKS hearing should have been held [id pp 28].

MATERIAL FACTS AND LAW OVERLOOKED BY THE PANEL AND ARGUMENT

The court must show that the court engaged in "meaningful consideration of [the] question" METROPOLITAN LIFE INS. CO V. USERY, 426 F. Supp 1560, 171 (D. D.C. 1976) and unfortunately, the panel decision does not reflect this.
Tripati with his sworn and uncontroverted affidavit showed the value of the property exceeded $75,000, exclusive of interest and costs [Vol. 4 E.R. 10 pp 77; E.R. 26 pp 218 para 37; Vol. 4 E.R. 68 pp 991; 69 pp 998-999; 63 pp 972-973; 74 pp 1029-1031; 53 pp 919 para 26].
Tripati's affidavits constituted sufficient evidence as to the value of the property ZACHARIA V. HARBOR

ISLAND SPA, INC., 684 F.2D 199, 202 (2nd Cir. 1982). The panel decision is based on material facts being overlooked and conflicts with RIGGINS V. RIGGINS, 415 F.2D 1259, 1260-61 (9th Cir. 1969). Defenses asserted by defendants should not have been considered RIGGINS.

Tripati swore under oath that he saw Defendants take the property under false pretenses [Vol. 4 E.R. 76 pp 1081, 1085; E.R. 69 pp 998-999; 68 pp 991; 63 pp 972-973; 67 pp 987]. The panel's decision that defendants showed otherwise is based on material facts being overlooked and UNITED STATES V. STEPHENS, 203 F.3D 914, 917-18 (9th 2000) states there is no consent when there is mis-representation of authority.

Tripati swore the warrant did not allow taking of the property missing [Vol. 4 E.R. 68 pp 991; E.R. 74 pp 1029-1031, 1022, 1024-25; E.R. 75 pp 1074-84] and nothing controverts this. CASE V. KITSAP COUNTY SHERIFF'S DEPT, 249 F.3D 921 (9° Cir. 2001) is in conflict with the panel decision based on the panel overlooking material facts.

Tripati filed an affidavit setting forth 801(d)(2) statements made by Defendant Archuleta [Vol. 4 E.R. 61 pp 950964] and also addressed these in the response to defendants JMOL [Vol. 4 E.R. 74 pp 1022; 75 pp 1079-1084] which the court supposedly did consider (memo at 5 "there is no basis in the record ... that the District Court refused to admit statements of Teresa Archuleta.").

The panel decision conflicts with ALEXANDER DAWSON INC. V. NCRB, 586 F.2D 1300, 1302 (9th Cir. 1978) because the Jury and not the court makes "its own determination of the authenticity of the

admitted evidence and the weight it feels the evidence should be given."

"Even if a District Court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has the slightest probative value" DOUGLASS V. EATON CORP, 956 F.2D 1339, 1344 (9th Cir. 1992). As the statements were contrary to defendant's position, the District Court and the panel erred in finding this was insufficient evidence. UNITED STATES V. MATLOCK, 415 U.S 164, 172 (1974).

The panel overlooked material points of law on the admissibility of 801(d)(2) statements and the decision conflicts with UNITED STATES V. MATLOCK, 415 U.S. 164, 172 (1974). Tripati does not have to have first hand knowledge of 801(d)(2) statements made by defendant Archuleta. MAHLANDT V. WILD CANID SURVIVAL & RESEARCH CTR, 588 F.2D 626, 630 (8th Cir. 1978).

The entire case can be based on the testimony of only one witness-Tripati or Archuleta- IN RE BEVERLY HILLS FIRE LITIGATION, 695 F.2D 1207 (6th Cir. 1982). In this matter, this material point of law was overlooked by the panel.

The panel overlooked the fact that Tripati did request a FRANKS hearing [Vol. 4 E.R. 71, 73; E.R. 69 pp 997 to 999; E.R. 70 pp 1000-1007] and set forth in his affidavit that the probable cause was manufactured [Vol. 4 E.R. 86 pp 1139 lines 4-12; 1141 lines 1-15]. This mandates rehearing.

FOURTH REASON FOR RELIEF

AS ROLE 50 PRESUMES A JURY HAS BEEN

IMPANELED, IN LIGHT OF THE FACT THERE WAS NO JURY, THE DECISION THAT IN THE FINAL PRETRIAL CONFERENCE A RULE 50 MOTION MAY BE GRANTED IS CONTRARY TO THE LAW OF THIS CIRCUIT.

MATERIAL FACTS AND LAW OVERLOOKED BY THE PANEL

The District Court held the final pretrial conference and Tripati filed his objections, affidavits and exhibits, as ordered [Vol. 1 E.R. 13, 14, 15, 18, to 21, 23 to 73, Vol. 5 E.R. 941.

The District Court relied on only the arguments of Counsel [Vol. 4 E.R. 76] as defendants submitted no evidence.

The District Court did not grant a motion pursuant to Rule 52 applying 56 standards; The District Court granted Rule 50 relief in the pretrial conference.

The District Court granted Rule 50 rPliPf in the pretrial conference.

The standard for Rule 56 relief is different from Rule 50.

For Rule 56 relief -the Court must determine whether there are triable issues of material fact OLIVER V. KELLER, 289 F.3D 623, 626 (9th Cir. 2002).

The trial jury and not the court decides the authenticity of evidence ALEXANDER DAWSON INC. V. NLRB, 586 F.2D 1300, 1302 (9th Cir. 1970).

During Final ?retrial Conference, the trial Judge cannot make credibility determination of the evidence IN RE EXXON VALDEZ, 270 F.3D 1215, 1237 (9th Cir. 2001) as in this case.

As plaintiff made a jury demand findings pursuant to Rule 52 and not Rule 50 should have been made BURGER V NEW YORK INSTITUTE OF TECHNOLOGY, 94 F.3D 830, 832-833 (2nd Cir. 96)

When Rule 50 relief is granted, courts "assume the veracity of the evidence submitted by plaintiff through his affidavits", ARBAN V. WEST PUB, 345 F.3D. 390, 400 (6th Cir.2003).

Arguments of Counsel are not a substitute for evidence. S. A. EMPRESS DA VIACAD AEREA RIO GRANDENSE V. WALTER KIDDE & CO, 690 F.2D 1235 (9th Cir. 1980).

During the Final Pretrial conference, summary judgment standards must be applied. PORTSMOUTH SQUARE HOLDERS PROTECTIVE COMMITTEE, 770 F. 2D 866, 869 (9th Cir. 1985)

When there are disputed issues, they "require a jury -to resolve the parties differing versions of the truth". AYDIN CORP V. LORAL CORP, 718 F.2D 897, 902 (9th Cir. 1983).

A Rule 50 motion can only be granted after all the evidence is presented. McSHERRY V. LONG BEACH, 423 F.3D 1015 (9th Cir. 2005).

ARGUMENTS

In McSHERRY, this court stated–"Rule 50(a) presumes that a jury trial has begun..." and that "a party has not been fully heard until he has submitted all of his evidence and closed his case."

Further WATERS V. YOUNG, 100 F.3D 1437 (9th Cir.1996) states "Rule 50(a) thus explicitly requires the moving party to" specify—the law and the facts on which [it] is entitled to judgment."

Here- the jury was not impaneled and defendants did

not "specify the law and the facts on which they were entitled to judgment." WATERS(SUPRA).
The court was required to apply summary judgment standards during the final pretrial conference. PORTSMOUTH SQUARE INC, (SUPRA).
As the standard of Appellate Review is affected by the motion that is granted, the correct rule must be used to grant or deny relief ACUSCHNET CO V. MOHAS CO CORP, 191 F.3D 69, 79 (13t Cir. 1991).
Due to the fact that this was the final pretrial conference, by applying Rule 50 standards-both the panel and District Court violated McSHERRY; Supra; WATERS; Supra. The proper standard is the summary judgment standard which was not applied by the panel or the District Court.

FIFTH REASON FOR RELIEF

FAILURE TO GRANT MEANINGFUL APPELLATE REVIEW AND THE APPLICATION OF THE WRONG STANDARDS BY THE TRIAL COURT, ARE STRUCTRAL DEFECTS, NOT SUBJECT TO HARMLESS ERROR.

In the trial court, ARIZONA V. FULMINANTE, 111 S. Ct. 1246, 1265 (1991) holds "structural defects in the constitution of the trial mechanism, --defy analysis by "harmless-error" standards." However, it is logical to extend this principle, to those situations, where, as in this case, Appellate Panels do not engage in a meaningful review of the record, thereby denying meaningful Appellate consideration.
(1) The District Court in this case applied Rule 50 and not Rule 56 standards, which is never harmless because of different standards of appellate review.

(2) The Panel overlooked material issues of facts and law, as set forth in this petition, which is never harmless. Meaningful Appellate review requires the panel review the record and engage in a meaningful consideration of the issues, which, was apparently not done in this case, by this panel. According to McNABB V. UNITED STATES, 63, S. Ct 608, 616 (1943) "learning, good sense fairness, and courage" is essential for the fair administration of justice. The action of this panel and three other panels in footnote 1, raise "grave constitutional overtones" GRUNEWALD V. UNITED STATES, 77 S. Ct. 963 (1991).

Ninth Circuit panels, Counsel believes, are not reviewing the record meaningfully and not properly applying established law to cases in which Tripati is a party. EN BANC review is necessary to ensure the application of "proper standards." MARSHALL v. UNITED STATES, 79 S. Ct. 117 (1959).

CONCLUSION

Based on the reasons set forth in this petition, the petition for re-hearing should be granted and the matter heard EN-BANC.

CERTIFICATE OP COMPLIANCE

This petition has 15 pages, is monospaced and typed on a 10 Pitch Courier

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FEB 2 4 2004
CATHY A.
CATTERSON
CLERK
U.S. COURT OR
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ANANT KUMAR TRIPATI,

Respondent.

No. 93-80317
D.C. No. CV-
00-1345-ROS

Arizona (Phoenix)

ORDER,
Before: .FERNANDEZ, W. FLETCHER and
TALLMAN, Circuit Judges

This court has reviewed the notice of appeal and accompanying documents filed December 3, 2003 in the above-referenced district court docket pursuant to the pre-filing review order entered in this docket. Because the appeal lacks merit, it shall not be permitted to proceed. All pending motions are denied.

A certified copy of this order served on the

district court for the District of Arizona shall act as and for the mandate of this Court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

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US COURT APPEALS
9th CIR CLERK

ANANT KUMAR TRIPATI 102081
BOX 3200
Buckeye, AZ 85326

93-80317

UNITED STATES COURT OF APPEALS

For the 9th CIRCUIT

In Re: ANANT KUMAR TRIPATI,

Respondent

PETITION PURSUANT TO THE ALL WRITS ACT.[1] INITIAL EN BANC SUBMISSION REQUESTED

[1] Judge Barry Silverman is disqualified in this matter.

JURISDICTION

28 U.S.C. 1651 provides "all courts established by Act Of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law" and as FRAP 35(a)(1) and Circuit Rule 35 give the en banc court jurisdiction to review decisions made by three judge panels to secure and maintain uniformity of decisions and when the proceeding involves a question of exceptional importance, jurisdiction is proper.[2] In re Marciano Ellis v United States District Court 2004 DJDAR 1305 (9th Cir. en banc, February 4th, 2004 No 01-70724).

A three judge panel is an "inferior tribunal" within the meaning of FRAP 35 and as such an application under the ALL WRITS ACT is proper "to compel it to exercise authority when it is it's duty to do so" Cordoza v Pacific States Steel Corp, 320 F3d 989, 998 (9th Cir. 2003) Petitioner lacks any alternative means of redress on the issues herein, he has no right to appeal of the panel decision because the panel has directed no petition for en banc determination be filed by the Clerk, and the panel decision is clearly erroneous see In Re Marciana-Ellis, supra.

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[2] The panel stated that the appeal lacked merit. First and foremost, the petition speaks of, with documentary support, three judges asking for destruction of records and shows with documentary support, the records were destroyed. This certainly has merit. Under Miller-El v Cockrell 123 S.Ct. 1029 (2003), without issuing a COA, the panel could not make the determination it made. One can only conclude, the panel "rubber stamped the District Court without reviewing the record" see(APP D and E)

As an en banc court can overturn the decision of a three judge panel, and as the three judge panel has directed the court clerk not to file a petition for en banc determination, relief by way of the ALL WRITS ACT is proper.

STATEMENT OF FACTS

Petitioner filed an application for a certificate of appealability (EX A) seeking leave to appeal the order of the District Judge set forth as EX B. The en banc panel entered EX C, denying the certificate of appealability, finding the appeal lacked merit and directed the clerk not to entertain any petition for rehearing or en banc determination.

(EX C). The panel decision is clearly in excess of it's authority under FRAP and Circuit Rule 35. It's decision is clearly erroneous, especially when the District Judge in this case, has been written of a great deal and has been a subject matter of numerous writings such as EX D and judicial misconduct complaints, by petitioner and
others, EX E.

REASONS WHY THE PETITION MUST BE HEARD EN BANC

This matter should be heard en banc because of the following reasons;

1. The panel decision involves a question of exceptional importance for it conflicts with FRAP 35 and Circuit Rule 35. The panel has stated that "no petition for en banc determination can be filed." However, whether or not a matter may be heard en banc, can only be decided by an en banc court and not "an appellate panel" Nothing in FRAP and Circuit Rule

35 gives a panel this authority. As such, the panel acted in excess of it's authority.

2. The panel decision conflicts with the following decisions made by the United States Supreme Court and by directing no en banc petition be entertained, the panel has prevented this being considered by the en banc panel. In deciding the issues, the panel acted contrary to Miller-El v Cockrell 123 .S.Ct. 1029 (2003) Vasquez v Hillery, 474 U.S. 254 (1986) Alcorta v Texas 355 U.S. 28 (1957) Mooney v Holohan 294 U.S. 103 (1935) Napue Illinois 360 U.S. 264 (1957) Brady v Maryland 373 U.S. 83 (1963) Arizona v Youngblood 488 U.S. 51 (1988) Herrera v Collins, 506 U.S. 390 (1993) and Bracy v Gramley 520 U.S. 899 (1977) For these reasons review by the full court is essential.

ARGUMENT

Petitioner filed an application for a certificate of appealability in the trial court which was denied (EX H) and moved this court for leave to appeal (Ex A). As fully set forth in EX A, the trial court was in error when it denied the habeas petition. The panel stated the appeal lacked merit, however, it's decision is clearly erroneous, for it conflicts with Vasquez/ supra (EX A at page 15-17) Alcorta, Mooney and Napue (EX A at page 18-20) Brady (EX A at page 21 to 23) Youngblood (EX A page 24 to 25) Herrera (EX A page 26 to 27) and Bracy (EX A page 31) The panel did not take into consideration, the misconduct by the trial judge as reflected in EX D and E. It however, directed the Clerk not to file a petition for hearing en banc. (EX C).[3]

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[3] Under Miller-El, supra, the panel could not make this determination without first issuing a certificate of appealability. It did not issue this certificate. had the panel reviewed the record, it would

CONCLUSION

The panel exceeded it''s authority when it directed no petition for en banc hearing be filed by the Clerk. Petitioner has no alternative means of seeking review of the panel decision, except by this application. The panel decision is clearly erroneous. Hence this court should grant relief and direct the clerk to permit the filing of an application for hearing en banc. Petitioner asks that he be given 20 days after relief is granted to submit the filing.

March 2, 2004

ANANT KUMAR TRIPATI

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have "found documented evidence showing that three Arizona Judges asked for and had evidence destroyed" and it would also have found that the District Judge on habeas, has a well documented record of covering up "misconduct by Maricopa County Superior Court Judges" see generally Summerlin v Stewart, NO 98-99002 It would have also discovered that as to petitioner, the District Judge "acted as counsel in a companion case--counsel for the County Attorney" and petitioner as well as others filed complaints as to this misconduct (App E) with the entire transcripts posted in a PDF file on www.corruptarizonacourts.com.

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9th CIR CLERK

93-80317

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In RE Anant Kumar Tripati, Respondent	)

PETITION TO RECALL MANDATE
INITIAL EN BANC SUBMISSION REQUESTED

FREDERICK A. ROMERO, ESQ California Bar NO.92423 P. 0. Box 70662 Pasadena, CA 91117
Attorney for Respondent, Anant Kumar Tripati

INTRODUCTION[51]

[51] Circuit Judge Barry Silverman should be disqualified

The panel decision conflicts with Vasquez v. Hillery, 474 U.S. 254 (1986) Mooney v. Holohan, 294 U.S. 103 (1935) Brady v. Maryland, 373 U.S. 83 (1963) Arizona v. Youngblood, 488 U.S. 51 (1988) Hererra v. Collins, 506 U.S. 390 (1993) Bracy v. Cramley, 520 U.S. 899 (1997) Williams v. Taylor, 529 U.S. 362 (2000) because Tripati has demonstrated he is factually innocent as defined by Bousley v. United States, 523 U.S. 614 (1998) and Dretke v. Haley, 541 U.S. 386 (2004).

(a) The decision of Arizona Courts is contrary to,or involved an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court; and (b) it is based on an unreasonable determination of facts in light of the evidence presented in the States Court proceedings Williams v. Taylor, 529 U.S. 362 (2000).

As such, the Panel[52] should have issued the Certificate of Appealability[53] Miller-EL v. Cockrell, 537 U.S. 322 (2003).

RULE 41 OF THE FEDERAL RULES OF APPELLATE PROCEDURE PROVIDE FOR RECALLING MANDATES.

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as he was the Magistrate Judge in this matter initially.

[52] Tripati sought EN-BANC hearing but the Clerk rejected the papers as ordered by the panel [Ex 161.

[53] The panel decision forbids Tripati from seeking reconsideration or EN-BANC review.
Tripati filed a complaint for judicial misconduct to seek reconsideration. This however is not the proper remedy.

In NEWHOUSE v. ROBERTS ILIMA TOWERS, INC, 708 F. 2d 436 (9th Cir. 1983); Williams v. U.S., 307 F. 2d 366 (9th Cir 1962); Rivera v. U.S. 477 F. 2d 927 (3rd Cir. 1973), the Court's have set forth the criteria for recalling mandates. This petition satisfies that criteria for recalling mandates because the panel refers to a December 3, 2003 filing [EX 1) but the District Court denied the Certificate of Appealability on January 23, 2004 [EX 2). The Panel presumably did not read the record.

BACKGROUND FACTS

Tripati has been sentenced to prison until 2044 and with no possibility of release prior to 2044.

On January 28th, 2004 the District Court denied Tripati's request for a Certificate of Appealability [Ex 2] .

The Appellate panel stated "This court has reviewed the notice of appeal and accompanying documents filed December 3, 2003."

(Ex 1) and concluded the appeal lacks merit.

Apparently- that panel must have read some document-other than the request for a Certificate of Appealability based on the District Courts Order of January 28th, 2004 [Ex 2] as merit clearly can be seen in the appeal.

Counsel asks this Court to recall the mandate and to afford Counsel the opportunity to file an application for a Certificate of Appeability or in the alternative to consider this motion as such request.

STATEMENT OF PERTINENT FACTS

According to Robert Fred Girdley, an alleged victim of Tripati's crime, the prosecutors:

"Informed me if I did not blame Mr. Anant Kumar

Tripati I shall be charged with crimes in Arizona." "Once I was granted absolute immunity from prosecution ...I blamed Mr. Tripati." [Ex 3)4

The second victim, Helen Maureen Jones submitted her affidavit [Ex 4] stating "Mr. Tripati never asked me to post any bail bonds."

"Before testifying for the State of Arizona, I had numerous conversations with Donald E. Conrad and informed him of the above."

A real estate appraiser stated [Ex 5]

4 On March 30th, 2005 a second panel affirmed a second decision. However-the record in that matter was with the Justice Department in Maryland. A third panel on February 28th, 2006 affirmed another Tripati matter. Once again that record was in the District Court. Ninth Circuit panels are affirmed without the record.

Both these panels like the panel in this case, have barred Tripati from seeking reconsideration or EN BANC review. Tripati hence filed complaints for judicial misconduct as the vehicle to seek reconsideration. This is not, however, the proper vehicle.

"I informed Mr. Conrad and Chatfield that Mr. Tripati did not ask me to arrive at the $5,000,000 value."

They shut off the interview tapes and repeatedly threatened me with criminal prosecution. Mr. Conrad told me if I testified for Mr. Tripati I will be prosecuted."

On June 16, 1993 the paralegal working for Don Conrad, the prosecutor, wrote the memo marked Ex 6 setting forth the actions she took, upon the request of Don Conrad.

Teresa Archuletta also submitted the interview marked Ex 7.

THE ADMINISTRATIVE INVESTIGATION

As Tripati is in custody, he gave the documents he received to prison officials to copy. Prison authorities lost the documents [Ex 8].

Tripati gave them the taped interview to be mailed to the County Attorney's office. Prison mail room staff switched the tapes [Ex 9].

Tripati filed administrative complaints and prevailed [Ex 8, 9, 10, 11, 12]. The State of Arizona offered to compensate Tripati for the lost evidence.

JUDGE RONALD REINSTEIN ASKS FOR DESTRUCTION OF EVIDENCE.

The State of Arizona does not have a uniform way of preparing documents. Their agents scribble [Ex 13 para 4]. According to an internal report [Ex 14]

"-Judges Ron Reinstein, Schwartz, and Gregory Martin ... want documents destroyed...."

Once Tripati took the issue of the evidence to the court, the Arizona Attorney General submitted an affidavit stating [Ex 15).

"On 10-29-99 I have received a telephone call from Judge Ron Reinstein from the Superior Court of Arizona -.Judge Reinstein stated that Tripati's post conviction release request was dismissed_."

That affidavit speaks about the call referred to in Exhibit 14.

ARIZONA COURTS SUMMARILY DENY RELIEF

Without any hearings, Judges Ron Reinstein, Schwartz, and Gregory Martin summarily denied Tripati relief.

The Arizona Appellate and Supreme Courts issued post

card denial.

THE PANEL DID NOT COMPLY WITH MILLER-EL v. COCKRELL, 123 S. CT. 1029 (2003), SLACK v. MCDANIEL, 529 U.S. 473 (2000) BECAUSE IT DID NOT RAVE THE BENEFIT OF EITHER THE DISTRICT COURT'S ORDER OF JANUARY 28", 2004 NOR THE RECORD ON APPEAL.

"The petitioner must demonstrate that reasonable Jurists would find the District Court's assessment of the constitutional claims debatable or wrong" Slack v. McDaniel, 529 U.S. 473, 484 (2000) when they have been denied on the merits. However, "the showing a petitioner must make to be heard on appeal is less than to obtain relief" and any doubts must be resolved in petitioner's favor Lambright v. Stewart, 220 F. 3D 1022, 1025, 1025 n4 WI Cir. 2000).

Arizona Judges had "some basis for rendering a biased judgment, [with) actual motivation -hidden from review" Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (emphasis added). The Vasquez court vacated a conviction where there was racial discrimination in the Grand Jury process.

According to the court "when Constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge or presumption of regularity nor evaluate the resulting harm.

On the face of the evidence, the Arizona courts and

the District Courts were required to order discovery and evidentiary hearing. Bracy v. Gramley, 520 U.S. 899 (1997).

Judges do not make phone calls concerning cases before them and do not ask for evidence to be destroyed (Ex 6, 7, 14, and 15). In Bracy, the Supreme Court stated petitioner had made sufficient showing that the trial judge was accepting bribes, hence warranting discovery. Tripati has made sufficient showing that Arizona judges involved corrupted the truth seeking process, hence discovery and an evidence hearing is warranted. As such, the Certificate of Appealability on the issue should have been issued.

The attached evidence show a violation of Brady v. Maryland, 373 U.S. 83 (1963) as they were not disclosed. "The suppression by the prosecution of evidence favorable to the accused_ violates due process where the evidence is material to guilt or to punishment," Strickler v. Greene, 527 U.S. 2633 (1999). These documents show the prosecutor; Donald Conrad manufactured evidence to obtain the convictions. Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 164 (1959); and Pyle v. Kansas, 317 U.S. 217 (1942) forbid such practice [Ex 3 to 7]. Prosecutors "must not" prevent witnesses from testifying.

The admissions by Arizona Department of Corrections that the State lost or destroyed favorable evidence [Ex 8 to 13] but while after the October 29th, 1999 phone call from Judge Ronald Reinstein [14, 15] was changed

shows pressure from the Arizona Judiciary. This evidence was destroyed because of animus between the parties. When, as in this case, the evidence is "likely or probably' exculpatory, bad faith need not be shown, United States v. Thomas, NO. 98-50420 1999 WL 17395 3 (t.il Cir. 9/24/99); Mitchell v. Goldsmith, 878 F. 2D 319 (9th. Cir. 1989). The decision is in conflict with Arizona v. Youngblood, 488 U.S. 51 (1988). Clearly, the evidence shows Tripati is "factually innocent and Hererra v. Collins, 506 (1993) forbids convictions of a factually innocent person." To be credible, (a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence, Schlup v. Delo, 513 U.S. 298, 324 (1995).

Tripati has reasonably shown with the evidence, that Arizona Courts decided the issue contrary to Supreme Court precedent. He has shown clearly established Supreme Court precedent having been misapplied by Arizona Courts. In light of the evidence, facts were unreasonably determined by Arizona Courts. Williams v. Taylor, 529 U.S. 362 (2000) mandates Habeas Relief. To satisfy the substantial showing standard Tripati must demonstrate that the issues are debatable among Jurists of reason; that the Court could resolve the issues [in a different manner], Barefoot v. Estelle, 463 U.S. 880, 893 (1983), and all doubts must be resolved in favor of issuing the certificate Jennings v. Woodford, 290 F. 3D 1006, 1010 (9th Cir. 2002).

As Tripati has satisfied his burden of proof, the Appellate panel erred in denying the certificate.

Tripati satisfies the Newhouse-Williams criteria.

Conclusion

This Court should recall the mandate and issue the Certificate of Appealabity. Further, appellate panels should not be allowed to bar litigants from seeking EN BANC review.

S/D_____
FREDERICK A. ROMERO, ESQ
California Bar NO.92423
P. 0. Box 70662 Pasadena, CA 91117
Attorney for Respondent, Anant Kumar Tripati

DECLARATION OF FREDERICK A. ROMERO

I, Frederick A. Romero duly sworn upon oath do hereby declare under the penalty of perjury the following statements are true and correct and I can so testify:

I am legal Counsel for Anant Kumar Tripati;

On January 28, 2004, the District Court denied Tripati's leave to appeal [Ex 2].

The panel denied Tripati leave to appeal based on some December 3, 2003 filings [Ex 1].

The panel did not have Jurisdiction to entertain a Court of Appeal request until after January 28, 2004.

It is clear from reviewing the panel order that Tripati's request was not considered and Tripati was shut out of the Appellate process.

The documents attached to the motion show that the action by the panel resulted in manifest injustice and that Tripati is factually innocent, based on credible evidence.

7. The decision of the Arizona Courts conflict with the Supreme Court precedent discussed and is based on the unreasonable interpretation of facts in light the evidence.

I request that the mandate be recalled and the court entertains the application for a Court of Appeal.

As two other Appellate panels, in this docket, have affirmed decisions without reviewing the record, EN BANC review is proper. In one matter, the record was with the Justice Department in Maryland, and the panel affirmed without the record. In a second matter the record was with the District Court and the Panel affirmed the decision.

As in this and the matters in item 9 above, the panels have forbidden the filing on motions to reconsider and

EN BANC review, their decisions cannot be reviewed. This request is not made for the purpose of delay or any improper purpose.

Attorney for Respondent, Anant Kumar Tripati

Cathy A. Catterson
Clerk of Court
(415) 556-9800

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

February 9, 2007

To: Counsel

From: Cathy A. Catterson, Clerk
By: Fred Taylor, Deputy Clerk

Re: Defective Petition for Rehearing

USCA No. 93-80317 Tripati v. -

A petition for rehearing in the referenced case was received on 2/5/07 and could not be filed for the following reasons:

- The Petition was received late and the mandate has been issued.

- NO FURTHER FILINGS SHALL BE ACCEPTED, PER 228/06 ORDER

FILED COPY
January 28, 2004
CLERK US DISTRICT
COURT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE, DISTRICT OF ARIZONA

	)	No. CIV-00-1345-PHX-ROS
Anant Kumar Tripati, Petitioner	)	
vs.	)	
	)	**ORDER**
Terry Stewart, et al., Respondents.	)	

On March 31, 2003, the Court dismissed with prejudice Petitioner Anant Kumar Tripati's Second Amended Petition for Writ of Habeas Corpus. (See Doc #42.) Tripati filed a Motion for Reconsideration on April 7, 2003. (Doc #44-1 and 44-2). He also filed a Motion for Certificate of Appealability on December

12, 2003, before the Court had ruled on the Motion for Reconsideration. On December 23, 2003, the Court denied the Motion for Reconsideration on the merits and denied the Motion fox Certificate of Appealability as premature. (Doc. #49.)

On January 5, 2004, Tripati filed a Renewed Motion for a Certificate of Appealability, a Motion for the Appointment of Counsel, and a Motion for Leave to File a Second Habeas Petition. (Doc:1150.) For the reasons stated below, the Court will deny the Motions.

DISCUSSION

I. The Motion for a Certificate of Appealability

A. Standard of review

Rule 22(b) of the Federal Rules of Appellate Procedure, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides that if a petitioner files a notice of appeal, the district judge who rendered the judgment in question shall either issue a certificate of appealability ("COA") or state why such a COA should not issue. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see Jennings v. Woodford, 290 F3d 1006, 1010 (9th Cir. 2002): In the COA, the district court must indicate which specific issues satisfy this showing. 28 U.S.C. 2253 (c)(3); see Jennings, 290 F 3d at 1010. "[C]ertificates of appealability are to be granted on an issue-by-issue basis[.]" Hivala v. Wood, 195 F.3d 1098, 1103 (9th Cir. 1999), cert.skukcl, 529 U.S. 1009 (2000). A circuit judge may also Issue a COA if one is denied by the district court. Fed. R. App. P. 22(b); see Jennings, 290 F.3d at 1010. Only issues specified in the COA may be considered on appeal. See Hiivala,

195 F.3d at 1102.

When the district court rejects a constitutional claim on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment alto constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); See Miller-El v. Cockrell, 123 S.Ct. 1029, 154 L. Ed. 2d 931, 949-51 (2003); Siva v. Woodford, 279 F.3d 825, 832 (9th Cir. 2002). When the district court rejects a claim on procedural grounds, a petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484; see Miller-El, 154 L. Ed. 2d at 949; Petrocelli v. Angelone, 248 F.3d 877, 883-84 (9th Cir. 2001). A prisoner seeking a COA must prove "'something more than the absence of frivolity' or the existence of mere "good faith" on his or her part. Miller-El 154L. Ed. 2d at 950 (quoting Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1983). However, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief [,]"and any doubts about whether a petitioner has satisfied the "jurists of reason would find it debatable" standard are resolved in the petitioner's favor. Lambright v. Steward, 220 F.3d 1022, 1025, 1025 n.4 (9th Cir. 2000).

B. Analysis

Petitioner asserted two grounds for relief in his Petition. (Doc. #1.) Magistrate Judge Dunan issued an R&R recommending that Petitioner's Petition be denied. (Doc. #38 and 41.) Petitioner filed timely objections to the R&R. (Doc. # 41.) After carefully

reviewing the R&R and Petitioner's objections, and conducting independent legal research, the Court filed an Order on March 31, 2003 adopting the R&R. (Doc. # 42.)

In his Motion for a Certificate of Appealability, Petitioner argues that the Court should have applied the "hidden motivations for entering a biased judgment provisions of Vasquez v. Hillary, should have applied a purported standard of review set forth in a series of cases dealing with perjured testimony, should have found a violation of Brady v. Maryland, misinterpreted Arizona v. Youngblood, applied the wrong standard of review to Tripati's actual innocence claims, should not have given a presumption of correctness to the state court's findings of fact, should have allowed discovery, and should have conducted an evidentiary hearing. (Doc. #50 at 15-32.) In addressing the Court's reasoning for denying relief on each of his claims, Petitioner makes the same legal arguments raised in his previous filings. These arguments, however, were previously rejected by the Court based on well settled law.

Having reviewed Petitioner's Motions for a Certificate of Appealability and the. reasons set forth in the Court's Orders for dismissing the Petition, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and reasonable jurists would not find the Court's assessment of Petitioner's claims debatable or wrong. See 28 U.S.C. § 2253(c); Slack 529 U.S. at 484; Fed. R. App.P. 22(b).

II. The Motion for Appointment of Counsel

In addition to his Motion for a Certificate of Appealability, Petitioner also moved for appointment of counsel to help him identify issues for his COA request,

alleging that the legal resources provided by the State are inadequate. (Doc. #50 at 3-4) A district court may appoint counsel to represent a habeas petitioner whenever "the court determines that the interests of justice so require and such person is financially unable to obtain representation." 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint counsel is within the discretion of the district court. See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th.Cir. 1986). Appointment is mandatory only when the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations. See id. Based on the materials in the court file it does not appear that appointment of counsel is required to prevent a due process violation. This Petition lacks merit, and this lack of merit will not be remedied by having an attorney aid the Petitioner. The motion will therefore be denied.

III. Motion for Leave to File a Second Habeas Petition

Petitioner has also filed Motion for Leave to Pile a Second Habeas Petition. (Doc. #50 at 33.) This Court has no jurisdiction to grant such a motion. Requests to file a second or successive habeas petition must be presented to a three-judge panel of the Court of Appeals. See 28 U.S.C. § 2244(0(3)(A). The Motion will be denied.

Accordingly,

IT IS FURTHIER ORDERED that Petitioner's application for a Certificate of Appealability (Doc. #50-1) is **DENIED.** A Certificate of Appealability shall not issue to Petitioner Anant Kumar Tripati on any of his claims for relief.

IT IS FURTHIER ORDERED that Petitioner's Motion for Appointment of Counsel (Doc. #50-2) is

DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Leave to File a Second Habeas Petition (Doc. #50) is **DENIED.**

DATED this 12 day of January, 2004.

.

S/D

_____

Roslyn O. Silver
United States District Judge

FILED COPY
January 28, 2004
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT
FOR THE, DISTRICT OF ARIZONA

	)	No. CIV-00-1345-PHX-ROS
Anant Kumar Tripati, Petitioner/Appellant	)	
vs.	)	**ORDER**
Terry L. Stewart, et al., Respondents/ Appellees,	)	

re: CERTIFICATE OF APPEALABILITY and IN FORMA PAUPERIS STATUS

I, Rosalyn O. Silver, Judge of the United States District Court for the District of Arizona, certify that I have examined the Petition of Anant Kumar Tripati for issuance of a Certificate of Appeal ability, together with the application for a Writ of Habeas Corpus filed in this court, and FIND:

Certificate of Appeal ability Granted. Probable cause exists for the appeal taken in the above-named cause through the United States Court of Appeals for the Ninth Circuit from the Order of

this Court denying petitioner's application for Writ. of Habeas Corpus, and GRANTS that petitioner be allowed to proceed in forma paupuris for this appeal.. The appellant has made a substantial showing of the denial of a constitutional right with respect to the following issues:_____

_____

[X] Certificate of Appeal ability Denied. Probable cause does not exist for the appeal. The applicant has not made a substantial showing of the denial of a constitutional right. In Forma Pauperis status denied as to this appeal.

The clerk shall forthwith notify the parties of the entry of this Order regarding Certificate of 'Appealability and In Forma Pauperis Status on Appeal.

Dated this 12 day of January, 2004

S/D_____
Roslyn O. Silver
United States District Judge

FILED COPY
March 31, 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No.CIV-00-1345-
)	PHX- ROS
Anant Kumar Tripati,)	
Plaintiff,)	
vs.)	
)	**ORDER**
Terry L. Stewart, et al.,)	
Defendant.)	
)	

Pending before the Court is United States Magistrate Judge David K. Duncan's Report and Recommendation ("R&R") (Doc. #38) and Order Clarifying R&R (Doc. #40). Both documents recommend that the Court dismiss Petitioner Anant Kumar Tripati's Second Amended Petition for Writ of Habeas Corpus (Doc. #36) filed pursuant to 28 U.S.C. § 2254 on April 23, 2002. For the reasons stated below, the Court will adopt the R&R and Order Clarifying R&R and dismiss the Petition,

BACKGROUND

Petitioner filed a Second Amended Petition for Writ of Habeas Corpus on April 23, 2002. (Doc. #36).

Petitioner challenges his convictions for fraudulent schemes, attempted fraudulent schemes, and false swearing, with prior felony convictions, and the imposition of concurrent and consecutive terms totaling 48 years.

The Second Amended Petition contains two counts for relief. The first count alleges violation of Sixth and Fourteenth Amendment rights when the Government allegedly lost and failed[54] to disclose exculpatory evidence' in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Arizona v. Youngblood, 488 U.S. 51 (1988). The second count, entitled "actual innocence," alleges that Petitioner's constitutional rights were violated when the State court denied him judicial review of the Arizona Board of Executive Clemency's denial of review of his application for clemency.

On May 29, 2002, Magistrate Judge/Duncan issued an R&R recommending that the Court dismiss Petitioner's Petition with prejudice. (Doc. #38). On June 6, 2002, Petitioner filed Objections to the R&R. (Doc. #39). Shortly thereafter, Magistrate Judge Duncan filed an Order Clarifying R&R. (Doc. #40). Petitioner filed another Objection to this document. (Doc. #41).

DISCUSSION

A. Standard of Review

Pursuant to the Federal Magistrates Act, 28

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[54] Petitioner contends the Government lost or destroyed eighty pages of Brady material as well as taped interviews with two State employees. The allegedly missing eighty pages included handwritten notes, faxes, memos, and affidavits made by and received by the prosecution.

U.S.C. § 636, a "district judge may refer dispositive pretrial motions, and petitions for writ of habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend dispositions." Thomas v. Arm, 474 U.S. 140, 141 (1985); §m 28 U.S.C. § 636(b)(1)(8); Estate of Connors v. O'Connor., 6 F.3d. 656, 658 (9th Cir. 1993). Any party who disagrees with the magistrate's recommendations "may serve and file written objections." 28 U.S.C. § 636(b)(I). "A judge of the court shall make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made." Id. "[P]arties who do not object to a magistrate's report waive their right to challenge the magistrate's factual findings but retain their right to appeal the magistrate's conclusions of law."Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991); see Jones v. Wood, 207 F.3d 557, 562 n.2 (9th Cir. 2000) ("Failure to object to a magistrate judge's recommendation waives all objections to the judges findings of fact."); Thomas, 474 U.S. at 149 ("[Section 636(b)(1)) does not . . . require any review at all . . . of any issue that is not the subject of an objection."); see also Fed. R. Civ. P. 72(b). A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(bX1); see Fed. R. Civ. P. 72(b). Finally, the decision of whether to issue a separate written opinion is entirely within the district court's discretion. See Boniface v. Carlson, 881 F.2d 669, 672 (9th Cir. 1989) (affirming Arizona district court's decision to adopt magistrate's R&R without written

8 opinion and stating: "Petitioner's . . . claim that the district court erred in adopting the magistrate's [R&R]

without a written opinion is without merit since the necessity of a separate opinion is entirely within the discretion of the judge.").

B. Analysis

1. The Magistrate Judge's R&R

In his R&R, Magistrate Judge Duncan found that Petitioner timely filed his petition under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). (R&R at 1) (Doc. #38). However, he recommended denying both of Petitioner's counts on the merits Id. 2-8).

First, Magistrate Judge Duncan found that Petitioner failed to present clear and convincing evidence sufficient to rebut the presumption of correctness of the State court's findings of fact. Therefore, he determined that Petitioner's first count, alleging violation of Sixth and Fourteenth Amendment rights by losing and failing to disclose exculpatory evidence in violation of Brady, 373 U.S. 83, failed. (R&R at 4) (Doc. #38).

Second, Magistrate Judge Duncan found that Petitioner's second count, alleging actual innocence," failed. Id, at 4-5. The magistrate judge noted that within his second count, Petitioner argued that his constitutional rights were violated when the State court denied him judicial review of the Arizona Board of Executive Clemency's denial of review of his application for clemency. Magistrate Judge Duncan determined that the State court followed clearly established federal law. Id at 5. As a final note, the Magistrate Judge remarked that "actual innocence," rather than providing an independent constitutional claim, acted solely as a "'gateway through which a habeas petitioner must pass to have his otherwise

barred constitutional claim considered on the merits.'" Id, (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

2. Petitioner's Objections

Petitioner objects to the magistrate judge (1) presuming the State court's finding of fact to be correct; (2) suggesting a bad faith requirement exists under Arizona v. Youngblood, 488 U.S. at 57-8; (3) finding a lack of bad faith on the part of the State court; (4) denying Petitioner an evidentiary hearing; (5) finding the State court engaged in a reasonable application of clearly established federal law; (6) stating that "actual innocence" failed to constitute an independent constitutional claim; and (7) "misread[ing1" Petitioner's second count for relief. The Court will address each of Petitioner's objections in turn.

a. State Court's Findings of Fact Are Presumed to be Correct

First, Petitioner argues that, since his first count for relief makes a Brady claim, the Magistrate Judge needed to review the entire record, and not presume the State court's findings of fact to be correct. (Objection at 5) (Doc. #39). However, earlier in his Objection, Petitioner noted that "[t]he federal courts must give a presumption of correctness to the state court findings, unless the petitioner can show by clear and convincing evidence otherwise."
Id. at 3.

Petitioner conflates the requirements, under Brady, for the state court and the requirements, under habeas corpus, for the federal court. Magistrate Judge Duncan's Order Clarifying R&R points out this confusion. (Order Clarifying R&R at 1) (Doc. #40). Pursuant to 28 U.S.C. § 2254(e)(1):

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Petitioner filed a habeas corpus action. Therefore, Magistrate Judge Duncan properly presumed the state court's findings of fact to be correct. However, Petitioner may rebut this presumption by presenting clear and convincing evidence. See, *infra*, Part c.

b. Arizona v. Youngblood Requires a Showing of Bad Faith

Next, Petitioner argues that, for a Brady claim, he may establish a violation of his due process rights under the Fourteenth Amendment without proving bad faith. (Objection at 6). Petitioner contends that the Magistrate Judge improperly read Arizona v. Youngblood as requiring a showing of bad faith for Brady claims. Id.

However, Magistrate Judge Duncan properly analyzed Petitioner's allegations concerning the Government losing and failing to disclose exculpatory evidence as both a Brady claim and an Arizona v. Youngblood claim.

(1) Petitioner's Brady Claim Fails

Petitioner alleges a violation of Brady, 373 U.S. 83. In Brady, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id, at 87. Judge Reinhardt recently explained that:

> Supreme Court cases following Brady clearly establish that the defendant must prove three elements in order to show a Brady violation. First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. Second, the evidence must have been suppressed by the State, either willfully or inadvertently. Third, prejudice must result from the failure to disclose the evidence.

Benn v. Lambert, 283 F.3d 1040, 1052-53 (9th Cir. 2002) (citations omitted). Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial. United States v. Bagley, 473 U.S. 667, 676 (1985). For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112 (1976). Moreover, courts analyze all the suppressed evidence together. Bagley, 473 U.S. at 682.

However, Brady and its progeny address exculpatory evidence still in the Government's possession. see. e,g,, Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 824 n.34 (10th Cir. 1995). The Supreme Court created a different standard for claims involving loss of evidence attributable to the Government. See Arizona v,, Youngblood, 488 U.S. at 57.

Petitioner argues that the Government "lost"

evidence after his trial that it also failed to disclose to him prior to trial. (Second Amended Complaint at 5) (Doc. #36). In the Order Clarifying R&R, Magistrate Judge Duncan explains that Petitioner's Bligly claim fails because he never demonstrated that "there existed some credible evidence of potential exculpatory value." (Order Clarifying R&R at 1) (Doc. #40). Considering the record as a whole, which contains overwhelming evidence of Petitioner's guilt, the Court finds Magistrate Judge Duncan correct. Consequently, Petitioner's Brady claim fails. However, as Petitioner also alleges the Government lost evidence, the Court must consider whether Petitioner adequately alleges an Arizona v. Younblood claim.

(2) Petitioner's Arizona v. Youngblood Claim Fails

For Petitioner to establish a federal due process claim relating to the Government's destruction or failure to preserve potentially exculpatory evidence, he must establish that: (1) the exculpatory value of the evidence was "apparent" before the evidence was lost or destroyed; (2) the evidence was of such a nature that the defendant would be unable to obtain comparable evidence through other reasonably available means; and (3) the Government acted in "bad faith" in destroying or failing to preserve the evidence. Arizona v Youngblood 488 U.S. at 57-8; Grisby v. Blodgett, 130 F.3d 365, 371 (9th Cir. 1997). [M]ere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith." Arizona vs, Youngblood 488 U.S. at 58; Villafuerte v. Stewart 111 F.3d 616, 625 (9th Cir. 1997) (holding that negligent investigation does not violate due process rights). Petitioner must show a "conscious effort to suppress

exculpatory evidence." California v. Trombetta, 467 U.S. 479, 488 (1984). Moreover, Petitioner bears the burden of showing that exculpatory evidence actually existed. See United States v. Marshall 109 F.3d 94, 97-8 (1st Cit. 1997).

Magistrate Judge Duncan reviewed the record and found "no indication of bad faith on the part of the State." (R&R at 4) (Doc. #38). After considering Petitioner's objections, as well as the rest of the record, the Court agrees with the Magistrate Judge. Consequently, Petitioner's Arizona v. Youngblood claim also fails.

c. Petitioner Fails to Present Clear and Convincing Evidence Rebutting the Presumption of Correctness Given to the State Court's Findings of Fact

Petitioner cites to several places in the record to support his argument that clear and convincing evidence exists sufficient to rebut the presumption of correctness given to the State court's findings of fact. (Objection at 6b-7) (Doc. #39). Having considered these portions of the record, the Court finds them insufficient to rebut the presumption. In particular, nothing cited to by Petitioner suggests the alleged conspiracy between the State courts, attorneys, and State law enforcement officers.

d. Petitioner is Not Entitled to an Evidentiary Hearing

Next, Petitioner contends that under Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002), the magistrate judge erred by denying Petitioner an evidentiary hearing. (Objection at 10) (Doc. #39). However, nothing in the Silva opinion supports Petitioner's contention. In that case, the petitioner filed a federal habeas petition

under 28 U.S.C. § 2253, not under 28 U.S.C. § 2254. Moreover, under the facts of the Silva case, AEDPA's strictures regarding evidentiary hearings did not apply. Id. at 834 n.8.

Unlike in Silva, AEDPA's provisions on evidentiary hearings apply to Petitioner's action. Under 28 U.S.C. 2254(eX2), evidentiary hearings are not required unless:

> (A) the claim relies on –
>
> i. a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> ii. a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

See Baja v. Ducharme, 187 F.3d 1075, 1078-9 (9th Cir. 1999) (discussing § 2254(eX2)'s standards governing habeas petitioner's request for an evidentiary hearing); Totten v. Merke, 137 F.3d 1172, 1176 (9th Cir. 1998) (holding evidentiary hearing not required on issues that can be resolved by reference to the State court record). After reviewing the entire record, as well as Petitioner's objections, the Court finds an evidentiary hearing unnecessary.

e. The State Court Reasonably Applied Clearly Established Federal Law

Petitioner objects to Magistrate Judge Duncan's report that the State court applied the federal law established by Brady and Arizona v. Youngblood reasonably. (Objection at 11) (Doc. #39). However, after careful review of the record, the Court agrees with the Magistrate Judge and finds the State court reasonably applied federal law.

f. "Actual Innocence" Falls to Constitute an Independent Constitutional Claim

Having disposed of Petitioner's objections relating to Count One of his Petition, the Court turns to Petitioner's objection that Magistrate Judge Duncan erred when he stated that a claim of actual innocence is not an independent constitutional claim. (Objection at 11-12). (Doc. #39). Petitioner contends that in Carriger v. Stewart 132 F.3d 463 (9th Cir. 1997), the court held that actual innocence constitutes a free standing claim.

In Carriger, the Ninth Circuit detailed the different standards to be used when addressing two types of claims involving an assertion by a petitioner of innocence. First, the court determined that a free standing claim of "actual innocence" existed when the possibility existed that an innocent person might be executed. Id at 476. The Ninth Circuit adopted Justice Blackmun's standard for his claim, as articulated by him in his dissent in Herrera v. Collins, 506 U.S. 390, 442-44 (1993). Under this standard, the petitioner "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Carriger 132 F .3d at 476.

Second, the Carriger court defined the standard to be used when a petitioner "accompanies his claim of

actual innocence with substantial claims of constitutional violations at trial." Id at 477. The Ninth Circuit held that an otherwise-barred claim would be considered on the merits if the petitioner's claim of "actual innocence is sufficient to bring him within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Id. (quoting Schlup v. Delo, 513 U.S. 298,315 (1995)). This "miscarriage of justice" claim, rather than constituting an independent avenue for relief, functions as a "gateway." For such an exception, the petitioner only need show "that in light of all the evidence . . . 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 478 (quoting Schlup, 513 U.S. at 327). A petitioner need not show that he is "actually innocent" of the crime he was convicted of committing, instead, he must show that "'a court cannot have confidence in the outcome of the trial." JA (quoting Schlup, 513 U.S. at 316)).

Review of the R&R and Petitioner's objection indicates a communication error occurred when Magistrate Judge Duncan believed that Petitioner used the term "actual innocence" to refer to a Herrera "miscarriage of justice" claim. Apparently, after reading Petitioner's objection, Petitioner used the term "actual innocence" to refer to a freestanding claim of actual innocence as described by the Carriger court. (Objection at 11-12) (Doc. #39). Regardless of which claim Petitioner asserts, his argument fails.

(1) "Actual Innocence" Claim Falls

While the Ninth Circuit holds that "actual innocence" constitutes a free standing claim when the possibility existed that an innocent person might be executed, Petitioner provides no case law or argument

why this holding should be extended to allow "actual innocence" to constitute a free standing claim when the possibility exists only of an innocent person being subjected to jail time. However, even if the Court found such an extension warranted, considering the overwhelming evidence of Petitioner's guilt, Petitioner fails to affirmatively prove he is probably innocent. Carriger, 132 F.3d at 476.

(2) "Miscarriage of Justice" Claim Fails

Petitioner fails to assert an otherwise barred constitutional claim. However, even if Petitioner asserted such a claim, considering the overwhelming evidence of Petitioner's guilt, Petitioner fails to convince the Court that it should not have confidence in the outcome of his trial. Id at 478.

g. The Magistrate Judge Properly Read Petitioner's Second Count

Finally, Petitioner argues that the Magistrate Judge misread his second count for relief. (Objection at 12-13) (Doc. #39). However, review of the R&R indicates that Magistrate Judge Duncan correctly read Petitioner's second count for relief as alleging "a constitutional violation in his denial of judicial review of the board of clemency's action in denying review of his application for clemency." (R&R at 4) (Doc. #38).

After carefully reviewing the R&R, Order Clarifying R&R, the applicable legal authority, and the record in this case, including the information submitted by Petitioner along with his objections, the Court finds no legal error and agrees with the Magistrate Judge's recommendations.

Accordingly,

IT IS THEREFORE ORDERED that Magistrate Judge David Duncan's Report and Recommendation

(Doc. #38) is **ADOPTED**.

IT IS FURTHER ORDERED that Magistrate Judge David Duncan's Order Clarifying R&R (Doc. #40) is **ADOPTED.**

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Doc. #36) is denied and this action are **DISMISSED WITH PREJUDICE.**

DATED this 28 day of March, 2003.

S/D_____
Roslyn O. Silver
United States District Judge

76

(2)

Supreme Court, U.S.
FILED
07-807 JUN 2 - 2007
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANANT KUMAR TRIPATI, Petitioner,	)
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, GUNN McKAY; DEAN CHATFIELD; DONALD CONRAD; MARICOPA COUNTY ATTORNEY; COUNTY OF MARICOPA; TERRY BLAKE; RONALD HARRIS; DICK MESH; GERALD GRANT; RICHARD M. ROMLEY; TERESA ARCHULETA; VINCENT H. TOLINO; ESTATE OF TERESA ARCHULETA; ED KING; BETSEY BAYLESS; TOM RAWLES; DON STAPLEY; MARY ROSE WILCOX; DORA SCHRIRO, ADOC DIRECTOR; TERRY GODDARD ATTORNEY GENERAL ARIZONA; MICHAEL MUKASEY, ATTONEY GENERAL UNITED STATES Respondents,	)

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME THREE OF THREE

ANANT KUMAR TRIPATI
P.O. BOX 70662,
PASADENA, CA 91117
(626)796-2231,
PETITIONER PRO PER

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COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

Anant Kumar Tripati, Petitioner, vs. TERRY L. STEWART; ET AL Respondents.	No. CIV 00-1345 PHX-ROS (DKD) **ORDER**

Pro Se Petitioner Anant Kumar Tripati requests relief from the Court's denial of his Second Amended Petition for Writ of Habeas Corpus. Pending before the Court are Petitioner's: (1) Motion for the Court to send him a copy of the Order adopting Magistrate Judge Duncan's R&R [Doc. #44-1], (2) Motion Pursuant to Rule 59(a)(2) and to Alter/Amend [Does. ##44-2 and 44-3], (3) Motion for Leave to File a Memorandum of Points and Authorities [Doc. #44-5], (4) Motion for Slummy Disposition of Rule 59 Motion to Vacate, Alter or Amend the Judgment [Doc. #47-11, (5) Motion for Certificate of Appealability [Doc. #48-1],

(6) Motion for Appointment of Counsel [Doc. #48-2], and (7) - Motion to File an Amended Petition/Second Petition [Doc. #48-3]. For the reasons stated below, the Motions are denied.

BACKGROUND

Petitioner Anent Kumar Tripati ("Tripati") is currently confined at the Arizona State Prison Complex in Buckeye, Arizona. In 1993, he was convicted in Arizona state court of fraudulent schemes, attempted fraudulent schemes, and false swearing in connection with a scheme to post bail bonds for indicted drug traffickers. (See Second Am. Pet. for Writ of Habeas Corpus at 1 [Doc. #36]; Answer at 2-8 [Doc. #13].) Because he was on parole at the time of his arrest, the trial judge sentenced him to roughly 50 years in prison. (Id.)

On April 23, 2003, Tripati filed a Second Amended Petition for Writ of Habeas Corpus. The Petition asserts two grounds for relief. The first ground alleges that the State violated Tripati's Sixth and Fourteenth Amendment rights by losing and failing to disclose exculpatory evidence in violation of aradyyLawind, 373 U.S. 83 (1963), and Arizona v. Youngblood, 488 U.S. 51 (1988). (Second Am. Pet. for Writ of Habeas Corpus at 5.) The second ground alleges actual innocence. (a at 6.) In its previous Order, the Court construed this ground to allege a freestanding claim of actual innocence, a miscarriage of justice claim, and a claim that the State denied Petitioner's constitutional rights by denying him access to the clemency process. (ice Order Adopting R&R at 8-10 [Doc. #42].)

On May 29, 2003, Magistrate Judge Duncan issued an R&R recommending that the Court deny and dismiss

the Second Amended Petition with prejudice. [Doc. #38.] Tripati filed Objections to the R&R on June 6, 2002. [Doc. #41.] Shortly thereafter, Magistrate Judge Duncan issued an Order Clarifying the R&R. [Doc. #40.] The Court adopted the R&R and the Order Clarifying the R&R on March 31, 2003. [Doc. #42.] Judgment was entered on that same day. [Doc. #43.] On April 7, 2003, Tripati moved for reconsideration of the Judgment. [Does. ## 44-1 and 442.] Several ancillary Motions are also pending.

DISCUSSION

I. The Motion for Copy of the Order Adopting the R&R

Tripati first moves for the Court to send him a copy of the Order adopting Magistrate Judge Duncan's R&R. (See Doc. #44-1, filed on April 7, 2003.) Tripati, however, quoted the Order in a document that he filed with the Court on April 14, 2003. (les Mem. in Supp. of Rule 59 Mot. to Vacatc, Alter or Amend at 7 [Doc, #45].) Because Tripati has received the Order, this Motion will be denied as moot.

IL The Motion for a New Trial Under Rule 59(a)(2)

Tripati next moves for a new trial under Rule 59(a)(2) of the Federal Rules of Civil

Procedure [Doc. #44-2.] No trial has taken place in this action. This Motion will therefore be denied.

HI. The Rule 59(e) Motion

Tripati next moves to alter or amend the Judgment under Rule 59(e).' [Does. ## 44-2 and 44-3] Tripati claims that the Court: (1) "reviewed the incorrect decisions of the (*ate [c]ourt," (2) should have applied Vasquez v. Hillery, 474 U.S. 254 (1986), to his claims, (3) failed to apply a series of Supreme Court cases

dealing with perjured testimony, (4)
misapplied Brady v. Matylanci, (5) misinterpreted Arizona v. Youngblood, (6) misinterpreted the facts when adjudicating his actual innocence claims, (7) should not have given the state court findings a presumption of correctness, and (8) should have granted him discovery and an evidentiary hearing. (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 2 [Doc. #45].)

A. Legal Standard

Rule 59(e) allows a party to file a motion to alter or amend a judgment within 10 days -after entry of judgment. Reconsideration of a judgment after its entry is "an extraordinary remedy, which should only be used sparingly." McDowell v. Calderon, 197 F.3d 1253, I255 n.1 (9th Cir. 1999) (quoting 11 Wright, EssignijawAiggandhygga 2810.1 (2d ed. 'Tripati also cites to Rule 60 in support of his request to alter or amend.(atm Doc.#44 at 2.) Because the request was filed within ten days of the Judgment, the Court will treat it as a Rule 59(e) motion. See Swimmer v. U 'tad States, 811 F.2d 1343, 1344 (9th Cir. 1987) ("That . . . motion, though it mentioned Rule 60, was made within 10 days and could have been brought under Rule 59. We may treat such a motion as having been made under Rule 59."); see also, Campbell v. Bartlett, 975 F.2d 1569, 1580 n.15 (10th Cir. 1992)("Motions served within 10 days of judgment 'ordinarily will fall under Rule 59(0: while motions-served later fall under Rule 60(b)"); Helm v. Resolution Trust Corp., 43 F.3d 1163, 1166-67 (7th Cir. 1995) ("Such a motion, if . . . [filed] within 10 days of a final judgment, is a 59(e) motion . . . . Conversely, a motion . . . [filed] more than 10 days after final judgment is a 60(b) motion.")

1995)). A motion under Rule 59(e) "should not be granted, absent highly circumstances, unless the district court is presented with newly discovered evidence, committed clear legal error, or there is an intervening change in the controlling law." 2)12 QongeatiagagmAulnist 179 F.3d 656, 665 (9th Cir. 1999). Such a motion "is not to be . . . used as second chance to correct a party's failure to present its strongest case in the first instance." Prudential Prop. & Cas. Ins. Co. v. Lillard-lkoberts, No. CV-01-0362-ST, 2002 WL 31488243, at * 1 (D. Or.2002). Nor is it the place for the parties to make new arguments not raised in their original briefs. 389 Orange St. Partmem 179 F.3d at 665.

B. Analysis

1. <u>The Court Reviewed the Applicable State Court Decisions</u>

Tripati first argues the Court failed to examine the correct state court habeas decisions. (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 2.) Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Court may not reverse a decision of the state court denying habeas relief unless the decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000). The Court "must look to the last reasoned decision of the state court as the basis of the state court's 18 judgment." Benson v. Terhune, 304 F.3d 874, 880 n.5 (2002). Tripati attached the 19 applicable state court decisions to his federal habeas

Petition. (S Pet. for Writ of Habeas 20 Corpus at 26, 32.) The Court examined these decisions before ruling. Tripati's argument thus has no merit.

2. *Vasquez v. Hillery* Is Inapplicable

Tripati next contends that the Court should have reviewed the state court decisions "under the hidden motive for rending a biased judgment provisions of Vasquez v. Hillery, 25 474 U.S. 254, 263 (1986)." (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 2.) In Vasquez, the petitioner challenged his state court conviction for murder on the grounds that he was denied equal protection because the trial judge excluded blacks from the grand jury that indicted him. 474 U.S. at 6. The federal district court found a constitutional violation and ordered the petitioner released. §erg 'inlay v. Pulley, 563 F. Supp. 1228 (E.D. Cal. 1963). The Ninth Circuit affirmed. 773 F.2d 644 (1984). On appeal to the Supreme Court , the State argued that the violation was harmless error. Am= 474 S U.S. at 260. The Supreme Court rejected that argument, stating "[constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." am 263.

Yuma does not apply here. Unlike the district court in yam= this Court has not found a constitutional violation. There is therefore no need to engage in harmless error analysis.

3. The Perjured Testimony Cases Are Inapposite

Tripati next argues that the Court should have applied the "framework" set forth in a series of Supreme Court cases dealing with perjured testimony? (Mean. in Supp. of Rule 59 Mot. to Vacate, Alter, or Amend at 4.) These

cases all hold, in one way or another, that the knowing use of perjured testimony to obtain a conviction violates due process. See, e.g„ Money, 294 US. at 342. Tripati argues that the Court should have perceived, in light of these cases, that his conviction was obtained through the use of "manufactured" evidence.
(Mem. in Supp. of Rule 59 Mot to Vacate, Alter or Amend at 5.)
Tripati has not demonstrated that his conviction was improperly obtained. The state court found "no . . . credible evidence that would support any of [Tripoli's] allegations[.]" (Sgg Order Dismissing Application, attached to Pet. for Writ of Habeas Corpus at 33 [Doc. M].) The state court's findings of fact are presumed correct unless the petitioner shows that they are erroneous by clear and convincing evidence. 28 U.S.C. § 2254(eX1). As the Court Those cases are: (1) Mooney v. Holahan, 294 U.S. 103 (1935), (2) Pyle v. Kafisaa, 317 U.S. 213 (1942), (3) Alcorta y. Teas, 355 U.S. 28 (1957), (4) Napue v. Illinois, 360 U.S. 264 (1959), (5) United States v. Agurs, 427 U.S. 97 (1976). The Court Did

Not Misapply Brady v. Maryland
Next, Tripati argues that the Court misapplied Brady v. Maryland, 373 U.S. 83 (1963) to his claims. (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 7.) Specifically, "Tripati takes issue with the Court's conclusion that be did not demonstrate that evidence of exculpatory value actually existed ask (pouting Order Adopting R&R at 6).) Once again, he argues that his submissions prove that the State "manufactured" the case against him. (11)
As discussed above, the state court found that Tripati's allegations of a conspiracy to obtain his conviction were

not supported by credible evidence. This Court finds no reason to conclude otherwise.

The Court Did Not Misinterpret Arizona v. oangblood

Tripati further contends that the Court "misinterpreted" Adzona v. Youngblood, 488 U.S. 51 (1988). (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 8.) In particular, he argues that Youngblood does not contain a bad faith requirement "when Brady materials are destroyed." (jd)

Tripati conflates his Brady claim with his Youngblood claim. Under Bat, the good or bad faith of the government is irrelevant when the state fails to disclose exculpatory evidence to the defendant. Youngblood, 488 U.S. at 57. When a petitioner alleges that the state hal potentially exculpatory evidence, however, Youngblood applies and the petitioner must show bad faith. j.. at 57

First, Tripati has not met his burden of showing that evidence of exculpatory value actually existed. See United States v, Marshall, 109 F.3d 94, 97-8 (petitioner bears the 24 burden of showing that exculpatory evidence actually existed). Second, even if he had, the Court finds no bad faith on the part of the State. (See also Order Adopting R&R at 7.)The Court Did Not "Micinterpret the Facts"

Next, Tripati argues the Court "misinterpreted the facts when reviewing the actual innocence claims[.]" (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 10.) He claims: "What this court disregarded is the fact that the crimes were manufactured by the State (Arguments 2 to 5) and as stated in argument 2, the judicial officers had a hidden 'motive to render a biased judgment" QM Once again, the state court found no credible evidence to support these claims. This

Court finds no reason to conclude differently.

The Court Did Not Misapply the Clear and Convincing Standard

Tripati next contends that he has produced sufficient evidence to rebut the presumption of correctness given to the state courts factual findings. (Mem. in Supp. of Rule 59 Mot. to Vacate, Alter or Amend at 11.) Having considered the record, the Court once again concludes that he has not.

8. Discovery Was Not Necessary

Tripati argues that he should have been granted discovery on his claims. "A habeas petitioner, unlike the usual civil litigant, is not entitled to discovery as a matter of course." Bracy v. Gramley, 520 U.S. 899, 904 (1997), sec also Itich v. Calderou, 187 F.3d 1064, 1068 (9th Cir. 1999), cert. denied, 528 U.S. 1092 (2000). A federal habeas petitioner will be entitled to discovery only "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6(a), Rules Governing Habeas Corpus Cases Under § 2254. "Good cause" means unique or unusual circumstances which prohibited the petitioner from either obtaining the requested discovery in state court, or from gaining access to the discovery conducted there. See McDaniel v. United States District Court, 127 F.3d 886, 888 (9th Cir. 1997); Smith v. Gibson, 197 F,3d 454, 459 (10th Cir. 2000). As stated in previous Orders, Tripati has failed to show good cause.Doc. #32 at 2; Doc. #28 at 4.)

9. An Evidentiary Rearing Was Not Required

Finally, Tripati argues that the Court should have granted him an evidentiary healing, 3 "An evidentiary hearing is not required on issues that can be resolved by reference to the state court record." Totten v.

!Acrid*, 137 F.3d 1172, 1176 (9th Cir. 1998) (emphasis in original). Nor is it required "'if the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief t" Id (quoting United States v. Birth, 792 F id
846, 849 (9th Cir. 1986)). Having reviewed the record, the Court once again finds an evidentiary hearing unnecessary. (See also Order Adopting R&R at 8.)
Because Tripati has failed to demonstrate clearlcgal error, newlydiscovered evidence, or an intervening change in the controlling law, his Rule 59(e) Motion will be denied. Ste 389 Orange St. Partners, 179 F.3d at 665.

The Motion for Leave to File a Memorandum of Points and Authorities

On April 7, 2003, Tripati moved for leave to file a memorandum in support of his Rule 59 Motion. [Doc. #44-4]. The Court considered Tripati's Memorandum (Doc. #45] in deciding the Motion. Tripati's Motion for Leave to File a Memorandum of Points and Authorities will therefore be denied as moot.

The Motion for Summary Disposition

On December 3, 2003, Tripati moved for summary disposition ofhis Rule 59 Motion. [Doc. #47.] Tripati argues that the court should summarily grant the Motion under District of Arizona Local Rule 1.100 because the State did not file a response. (Id, at 1.) Local Rule 1.10(p), however, provides that "(n]o response to a motion for reconsideration shall be filed unless ordered by the Court." The Court did not order a response. Tripati's Motion for Summary Disposition will therefore be denied.

IV. The Motion for a Certificate of Appealability and Motion for Appointment of Counsel

On December 3, Tripati also filed a Notice of Appeal (Doc. #48], Motion for a Certificate of Appealability [Doc. #48-1], and Motion for Appointment of Counsel (Doc. #48-2]. If a notice of appeal is filed before a Rule 59(e) Motion is decided, or even while 1 the motion is pending, the notice is a nullity. Fed. R. App. P. 4(a)(4); Osterneck v. Ems & 2 Whiney, 489 U.S. 169, 178-79 (1989) (timely motion under Rule 59(e) suspends finality of judgment and renders nullity any notice of appeal filed before its resolution); Ijnaleyyjkag, 895 F.2d 520, 523 (9th Cir. 1990) (same). "The time to file a notice of appeal begins to run after the entry of the order granting or denying the Rule 59(e) motion, and a new notice of appeal must be filed." Tinsley, 895 F.2d at 523. Because Tripati filed his Notice of Appeal while his Rule 59(e) Motion was pending, the Notice was a nullity. Accordingly, Tripati's Motion for a Certificate of Appealability and Motion for Appointment of Counsel will be denied as premature.

VII. The Motion to File an Amended Petition and Motion to File a Second Petition

On December 3, Tripati also moved to file an amended petition [Doc. #48-3) or, in the alternative, to file a second petition [Doc. #48-3). Tripati argues that he would have included additional claims in his Second Amended Petition if he had access to adequate legal resources. (App. for Cert. of Appealability at 36.) "Once final judgment has been entered, however, the court lacks power to rule on a motion to amend unless the party seeking leave [to amend] obtains relief under Rule 59(e) or Rule 60(b)." 3 Moore's Federal Practice, §15.12[2] (Matthew Bender 3d ed. 2003); see also Briddle v. Scott, 63 F.3d 364, 380-81 (5th Cir. 1995) (to obtain

IT **IS FURTHER ORDERED** that Petitioner's Motion for a Certificate of Appealability [Doc. #48-1] and Motion for Appointment of Counsel [Doc. #48-2] are **DENIED AS PREMATURE.** leave to amend, party must first obtain relief under Rule 59 or Rule 60, and raovant must clearly demonstrate that new issues could not have been raised before court's ruling and entry of final judgment); Figgie Intl v. Miller, 966 F.2d 1178, 1179 (7th Cir. 1992) (it is well settled that after final judgment plaintiff may seek to amend only after successful motion pursuant to Rule 59(e) or Rule 60(b)). Tripati has not obtained relief under Rules 59(e) or 60(b). The Court will therefore deny his Motion to File an Amended Petition.

Tripati's alternative Motion to File a Second Petition will also be denied. If Tripati wishes to file a second or successive habeas petition, he must first obtain an authorization.

DATED this 28th day of March, 2003.

S/D_____
Roslyn O Silver
United States District Judge

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MAY 29, 2002
CLERK S DISTRICT
COURT ARIZONA

IN THE 'UNITED STATES DISTRICT COURT

FOR THE, DISTRICT OF ARIZONA

)	No. CIV 00-1345
)	PHX-ROS (DKD)
Anant Kumar Tripati,)	
Petitioner,)	
vs.)	
)	**REPORT AND**
TERRY L. STEWART;)	**RECOMMENDATIO**
ARIZONA ATTORNEY)	**N**
GENERAL,)	
Respondents.)	
)	

TO THE HONORABLE ROSLYN 0. SILVER, U. S. DISTRICT JUDGE:

Anant Kumar Tripati, currently confined at the Arizona State Prison Complex in Buckeye, Arizona, filed a Petition for Writ of Habeas Corpus

on July 14, 2000 (Doc. #1), and an Amended Petition on September 8 (Doc. #5). Tripati challenges his convictions for fraudulent schemes, attempted fraudulent schemes, and false swearing, with prior felony convictions, and the imposition of concurrent and consecutive terms totaling 48 years. He claims in his federal petition that the prison lost exculpatory materials, and that he was denied judicial review of the Arizona Board of Executive Clemency's denial of review of his application for clemency.

On November 1, 2002, Tripati filed a Motion for Leave to Amend his Petition for Writ of Habeas Corpus (Doc. #34), to reinstate his second claim. He had previously excluded that claim in his Amended Petition (Doc. #5) because of the Court's order requiring exhaustion (Doc. #3 at p. 3). The Court granted the amendment in its April 23' Order (Doc. #35). The Court will decide the habeas petition on the merits. See 28 U.S.C. § 2254 (b)(2).

The facts surrounding Tripati's conviction are taken from the Court of Appeals' memorandum decision.

In late 1991, Eduardo Barraza-Lopez, his brother Rosario Barraza Lopez, and their two cousins Guillermo and Delfino Calderon were arrested and held in the Maricopa County jail pending trial on narcotic trafficking charges. Bond was set at $1,400,000 each for the two brothers and $140,000 each for their two cousins.

Tripati, who owned a Beverly Hills business called Legal Research, Inc., hired attorney James Devitt to represent the Lopez brothers. Tripati also contacted Roger Rudman, a Phoenix bail bondsman, to post bonds for their release. Rudman was informed by

Tripati that he had a piece of property in California appraised at 5 million dollars that could be used to secure the bonds. Tripati also gave him an appraisal of the property supporting the valuation.

Based on Tripati's representations and the appraisal, Rudman attempted to locate an insurance company to serve as surety for the bonds. When the various companies he contacted all declined, Rudman proposed that the `property bc posted directly with the court in lieu of a bond. Tripati approved this plan and provided Rudman and Melvin McDonald, an attorney Rudman retained to assist him, copies of two additional appraisals and other documents concerning the ownership of the property.

McDonald contacted the county attorney's office about having the property deeded to the court in lieu of bond and forwarded the documentation received from Tripati to permit the county attorney to make an independent analysis of the proposal. After the appraiser hired by the county attorney reported that the California property was worth only $30,000 to $40,000, Rudman and McDonald ceased working with Tripati.

At the same time he was working with Rudman, Tripati also contacted Robert Girdley, a Texas bondsman, to post bonds for the Lopez brothers and the Calderons. Like Rudman, Girdley was informed by Tripati that there was a piece of property in California valued at 5 million dollars that could be used as collateral for the bonds. Tripati also gave Girdley copies of the same appraisals he had submitted to Rudman. In addition, Tnpati provided Girdley with falsified documents indicating that there was a buyer willing to purchase the collateral in the event there was a default

on the bonds. After reviewing the documents, Girdley advised Tripati that they were not sufficient for marketing the proposal to an insurance company.

Approximately one week later, Tripati informed Girdley that he had located an insurance company, Financial Security Assurance Incorporated ("FSA1"), that was willing to act as surety for the bonds. Because he was not licensed to post bonds in Arizona, Girdley made arrangements with Helen Jones, an Arizona bondsperson, to work with him on posting the bonds. Tripati provided Girdley and Jones with bond documents that appeared legitimate. In addition, Tripati had a man named "John Jacobs,' who identified himself as the CEO of FSAI, telephone Girdley with instructions to post the bail bonds for the Lopez brothers and the Calderons. "John Jacobs" was in actuality a man named John Jacobson.

Girdley and Jones, dba "Bondco," posted the bonds, which named FSAI as the surety, with the Maricopa County Superior Court. Only Guillermo Calderon was released from jail when the bonds were posted as the state was successful in obtaining a stay with respect to the other three until a hearing could be held on the sufficiency of the bonds. Girdley thereafter discovered that FSAI was a fictitious company and reported this information to the authorities.

At the hearing on the sufficiency of the bonds, Tripati testified that he had no involvement in arranging for the bonds and specifically denied knowing Jacobson. It was later established that Jacobson was a long time family friend of Tripati's wife.

Tripati was indicted in CR 92-08576 on three counts of forgery, one count of fraudulent schemes and artifices, one count of attempted fraudulent schemes

and artifices, and one count of false swearing for his actions in arranging for Girdley and Jones to post bond for the Lopez brothers and the Calderons and for his false testimony at the court hearing. He was also charled in CR 92-09620 with one count of attempted fraudulent schemes and artifices based on his initial attempt to get Rudman to post the bonds. The state further alleged that Tripati had prior federal felony convictions and that he had been on parole at the time he committed the charged offenses. The two matters were consolidated for trial. The three forgery charges in CR 92-08576 were dismissed prior to trial.

At the conclusion of the five week jury trial, Tripati was found guilty of the four remaining charges. Tripati thereafter admitted his prior convictions. The trial court imposed concurrent aggravated prison terms in Cr 92-08576 of 20 years for attempted fraudulent schemes and artifices and 28 years for fraudulent schemes and artifices and an aggravated consecutive term of 4.5 years on the conviction for false swearing. The trial court also sentenced Tripati to an additional consecutive aggravated 20-year prison term for his conviction for attempted fraudulent schemes and artifices in CR 9209620. Finding that Tripati was on parole when he committed the offenses, the trial court further ordered that he serve all of his sentences without the possibility of early release. Tripati filed a 'timely notice of appeal in both cases.(Doc. #13C, Exh 0).

Tripati first claims the state lost exculpatory materials. The trial court denied his petition for post-conviction relief on this ground, stating as follows:

The Court is in receipt of the defendant's most recent post-conviction relief pleading. It is entitled

"Application for Writ of Habeas Corpus" but is, in effect, another petition for post-conviction relief under Rule 32. The Court has reviewed this pleading and the court files.

There are now approximately 65 volumes to the court's file in CR92- 08576 and another 30 volumes to the court's file in CR92-09620. These voluminous files are as a result of the defendant's continuous and persistent attempts to obtain post-conviction relief in his cases through the filing of petitions under Rule 32. To date all the previous petitions have been dismissed. His convictions and sentences were also affirmed on direct appeal.

This petition again alleges that the State has lost or wilfully destroyed evidence in the defendant's cases which would have changed the jury's verdict.

Much of what the defendant contends now has been presented in earlier proceedings but in a different fashion. The defendant has claimed before that the State lost a tape of an interview of a paralegal at the Maricopa County Attorney's Office, who is now deceased, which evidence corruption on the part of the prosecution and the judiciary which contributed to the convictions of the defendant on these cases. The defendant has asserted that this tape, the only tape in existence evidencing any of this, was intended for mailing by DOC personnel to the Maricopa County Attorney's Office and was lost by the County Attorney. The Court summarily dismissed this petition based on the entire story of this case and an affidavit from Dan Sands, an investigator at the County Attorney's Office, which said that the tape received contained nothing but music.

The defendant now claims that DOC must have

switched tapes and admits that, indeed, a music tape was sent to Mr. Sands and the important evidence tape to someone or someplace unknown. The defendant also claims that an affidavit from the paralegal corroborating the contents of the tape along with other important documentation supporting his claim for relief were also lost by DOC.

As with all the other similar claims raised by this defendant, the defendant offers no affidavit or other credible evidence which supports any of his allegations or which would, in this Court's mind, elevate this claim or argument to one which is colorable entitling him to further post-conviction relief proceedings. This is a defendant who has been convicted of numerous and sophisticated fraud schemes, who has been sentenced to lengthy prison sentences in these cases, and who has, in the past, been guilty of abusing his access to the court at all levels by filing vexatious, harassing claims for relief often supported by fraudulent; bogus, and manufactured evidence. This pleading, the Court concludes, is another like all the rest proceeding it.
(Doc. #13C, Exh)

The state court's finding is presumed to be correct. See 28 U.S.C. § 2254 (e)(l). In addition, assuming that Tripati had shown both the exculpatory value and otherwise unavailability of the evidence, there was no indication of bad faith on the part of the State See Arizona v. Youngblood, 488 U.S. 51, 57-58, / 09 S.Ct. 333 (1988). The Court finds that this is a reasonable application of clearly established federal law. See 28 U.S.C. § 2254(d)(2). Tripati also claims a constitutional violation in his

denial of judicial review of the board of clemency's action in denying review of his application for clemency. However, "commutation decisions have not traditionally been the business of courts." Connecticut Bd. Of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464. Because clemency procedures are "far removed from the original judicial proceeding," Woratzeck v. Arizona Bd. Qf Exec. Clemency, 117 F.3d 400, 404 (9th Cir. 1997), only minimal due process requirements apply. Id.

The court of appeals followed clearly established federal law in finding no due process violation:

> It is well established that a defendant who has been convicted of a crime has no constitutional right to clemency or any other form of early release from prison. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (""[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."' (quoting *Greenholtz v: Inmates of Nebraska Penal and Correcitonal Complex*, 442 U.S.1, 7 (1979)); *Arnold v. Arizona Bd. Of Pardons and Paroles*, 167 Ariz.
> 155, 158, 805 P.2d 388 391 (App. 1990) (whether to grant a commutation of sentence is a mater of grace and not a matter of right). Also, courts are reluctant to encroach on matters involving clemency which is an executive power. Solesbee v. Balkcom, 339 U.S. 9, 1-2 (1950) (citation omitted) (power of executive clemency has traditionally rested in governors or the president or is delegated to parole boards, but its power is

seldom subjected to review by the courts). Thus Tripati's argument that his due process rights were violated also fails. (Doc. #1 at p. 34-35).

Absent an arbitrary denial of access to the clemency process, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289,118 S.Ct. 1244, 1254 (1998), which Tripati claims but has not shown; he is not entitled to habeas relief.

Tripati also argues actual innocence. A claim of "actual innocence" is not considered an independent constitutional claim, but instead a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 862 (1993). In addition, the state court findings on direct appeal contradict his claim of actual innocence:

Tripati also contends that his convictions must be reversed because the evidence presented at trial was insufficient to support them. A judgment of acquittal is appropriate when there is "no substantial evidence to warrant a conviction." Rule 20(a), Ariz. R. Crim. P. "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mothers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). The evidence may be direct or circumstantial. *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993), cert. denied, 114 S.Ct. 705 (1994). To set aside a verdict on the basis of insufficient evidence, the reviewing court must clearly determine that upon no hypothesis whatsoever is there sufficient

evidence to support the conclusion reached by the trier of fact. *State v. Arredondo,* 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

The record provides ample evidence to support all four of Tripati's convictions. The facts already recited and others in the record clearly provide substantial evidence of Tripati's role in attempting to have the bonds posted to obtain the release of the Lopez brothers and the Calderons, which included knowingly making false or fraudulent pretenses, representations, promises and/or material omissions to Rudman, Jones and Girdley as part of a scheme to have them post bond. Thus his actions fall squarely within the definition of fraudulent schemes and artifices set forth in Ariz. Rev. Stat. Ann. ("A.R.S.") section 13-2310.[55]

Tripati makes a number of different and often incoherent arguments in attacking the sufficiency of the evidence with respect to the three fraud counts. For example, Tripati asserts that the count naming Rudman as a victim should have been dismissed because Rudman testified that he did not rely on any misrepresentations and did not provide any benefit to Tripati. The flaw in Tripati's argument is that even if reliance were an element of the completed offense, this count alleged only an attempt rather than a completed fraud. Tripati's lack of success in seeking to mislead

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[55]A.R.S. §13-2310(A) states:

Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

Rudman does not obviate the fact that the essential elements forthe offense of attempted fraudulent schemes and artifices were proven by the state. The similar challenge by Tripati to the sufficiency of the evidence for the second attempted fraud charge in which Jones was named the victim fails for the same reason.

Tripati also argues that there was no evidence of any benefit being obtained by him to support his one conviction for the completed offense. A.R.S. section 13-2310 does require that a person actually obtain a benefit to be guilty of the completed offense. The term "benefit" is defined in A.R.S. section 13-105(2) as "anything of value or advantage, present or prospective." The fact that Tripati was successful in having one of his clients bonded out is sufficient to permit the jury to conclude that Tripati did receive a benefit as a result of his scheme to defraud under this definition. See State v. Fagnant, 173 Ariz. 10, 14, 839 P.2d 430, 434 (App. 1992), vacated on other grounds, 176 Ariz. 218, 860 P.2d 485 (1993) (pecuniary gain not an essential or irreducible element of fraudulent schemes and artifices). Consequently, Tripati's argument on this point is also without merit.

Tripati also claims that the two counts involving Jones and Girdley as victims must be reversed because the evidence indicated that the bonds were actually posted by an entity named "Bondco" and that this entity was not licensed to post bonds in Arizona. The evidence is undisputed, however, that "Bondco" was merely a trade name registered by Jones, who was fully licensed by the Arizona Department of Insurance to post bail bonds.

Tripati further contends that he was tried on a

theory of fraud different than that presented the state to the grand jury. Our review of the grand j transcript finds that the evidence produced at trial was entirely consistent with that presented to the grand jury. Furthermore, the trial court instructed the jury on the fraud counts consistent with A.R.S. section 13-2310(A) and the language of the indictment brought against Tripati. Thus, Tripati's claim that he indictment was somehow improperly amended has no support in the record.

Finally, Tripati claims that all of his fraud convictions must be reversed because of the failure to establish reliance on thepart of any of the victims. However, reliance is not a necessary element of the offense of fraudulent schemes and artifices. A.R.S. § 13-2310(B); *State v. Fierson,* 146 Ariz. 287, 291, 705 P.2d 1338, 1342 (App. 1985). Tripati cites *State v. Johnson,* 179 Ariz. 375, 880 P.2d 132 (1994), for the contrary proposition. Since Johnson does speak to this issue, it is necessary to closely examine that decision.

Admittedly, Johnson says "[t]he [fraud] statute's language means that the false pretense must actually cause the *victim to rely* and, as a result, give property or money to the defendant." *Id.* at 378, 880 P.2d at 135 (Emphasis added.) Taken literally, this would represent a judicial excision of subsection (B) from A.R.S. section 13-2310. We do not believe the Johnson court intended such a result.

We first note that *Johnson's* principal thrust was to ascertain the meaning and scope of "false or fraudulent pretenses, representations, promises or material omissions" as used in subsection (A) of section 13-2310. The reason that was necessary was because the factual scenario presented to the court raised a

serious question whether any of he defendant's behavior fell within that terminology. Having found that nothing the defendant did amounted to a pretense, representation, promise or omission by means of which the defendant obtained a benefit, the Johnson court concluded that the most the defendant did was commit a theft. In other words, a theft which also involves a deception is not elevated to a section 13-2310 violation unless the deception causes, or is the means by which, the benefit is obtained. Id. at 380, 880 P.2d at 137. If the deception is merely the means by which detection is avoided, it is not a fraud but only a theft. *Id.*

It was in this context that the *Johnson* court commented on reliance. It appears that the comment was intended solely to enhance the distinction the court was drawing between fraud and theft. It was not necessary to the court's ultimate conclusion since the court's decision makes clear that a fraud is always distinguishable from a theft because fraud requires that the deception employed be the means by which the benefit was obtained. Whether the victim relied on the deception or not is not a necessary component to this causation analysis. As such, we are comfortable in treating the Johnson comments as dicta and therefore not binding. *Town of Chino Vall v. City of Prescott,* 131 Ariz. 78, 81, 638 P.2d 1324, 1327 (1981); In re Marriage of Berger, 140 Ariz. 156, 163 n.2, 680 P.2d 1217, 1224 n.2 (App. 1983).

We also note that Johnson made no mention of subsection (B) of section 13-2310 in the discussion on reliance. This may be explained by the fact that the court was discussing the statute as it had been construed in *State v. Haas,* 138 Ariz. 413, 675 P.2d 673 (1983). Haas, in turn, was construing the statute in its

pre-1980 form and it was not until 1980 that subsection (B) was added by the legislature. Thus, it is not unlikely that the Johnson court simply overlooked subsection (B). In any event, we conclude that the state was not required to establish reliance for Tripati to be convicted under this statute.

In contrast to the numerous arguments made in regard to the fraud charges, Tripati asserts without any elaboration that the state failed to prove the false swearing charge. Failure to argue a proposition on appeal constitutes waiver and abandonment. State v. Smith, 125 Ariz. 412, 416, 610 P.2d 462 50 (1980). In any event, the evidence presented at trial was more than sufficient to permit the jury to find that Tripati committed the offense of false swearing in violation of A.R.S. section 13-2703(A)[56] by knowingly giving false testimony at the hearing held concerning the adequacy of bonds.

(Doc. #13C, Exh 0)

Based upon the evidence before the court of appeals, Tripati's claim of innocence is unsupported. Therefore, because it is not an independent constitutional claim, and is in any event unsupported by the evidence, he is not entitled to relief.

IT IS THEREFORE RECOMMENDED that Arrant Kumar Tripati's Petition for Writ of Habeas Corpus be **DENIED and DISMISSED WITH PREJUDICE.** (Doc. #1, 5).

This recommendation is not an order that is

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A.R.S. §13-2703(A) provides:

A person commits false swearing by making a false sworn statement, believing it to be false.

immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(aX1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See, 28 U.S.C. § 636(bX I); Rules 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which to file a response to the objections. Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this _____ day of May, 2002.

S/D_____
David K. Duncan
United States Magistrate Judge

Anant Kumar Tripati 102081
Post Office Box 3200
Buckeye, Arizona 85326

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

	)	No. CIV 00-1345
	)	PHX-ROS (DKD)
Anant Kumar Tripati,	)	
Petitioner,	)	**SECOND AMEND.**
vs.	)	**PETITION FOR**
	)	**WRIT OF**
TERRY L. STEWART;	)	**HABEAS CORPUS**
ET AL	)	**BY A PERSON IN**
	)	**STATE CUSTODY**
Respondents.	)	**PURSUANT TO**
	)	**28 USC § 2254**

A. JUDGEMENT OF CONVICTION

1. Name and location of court which entered the judgment of conviction you are challenging:
   MARI COPA COUNTY SUPERIOR COURT
2. Case Number. CR 9208576/09620
3. Date of judgment of conviction: 11-30-1993
4. Length and terms of sentence(s):
   52.5 YEARS FLAT
5. Nature of offense(s) of which you were convicted (all counts):
   FRAUDULENT SCHEMES,
   ATTEMPTED FRAUD, FALSE SWEARING
6. What was your plea?
   NOT GUILTY

7. Kind of Trial: JURY
8. Did you testify at the trial? NO

B. APPEALS

1. Did you appeal the conviction or sentence? YES
   a. Name of court: DIVISION ONE
   b. Date the appeal was filed: 11/30/1993
   c. Result: AFFIRMED
   d. Date the appeal was decided: UNK
   e. Date the mandate was issued: UNK
2. Did you seek review of your appeal in the state supreme court? YES
   a. Date the petition was filed: UNK
   b. Result: DENIED
   c. Date the petition was decided: UNK
   d. Date the mandate was issued: UNK

C. FIRST STATE POST-CONVICTION PROCEEDINGS

1. Did you file a petition for post-conviction relief in the state court? YES
   a. Name of court: MARICOPA COUNTY SUPERIOR
   b. Date the notice of post conviction relief was filed: 11/30/1993
   c. Date the petition was filed: UNK
   d. Result: DENIED
   e. Date the petition was decided: 08/25/1994
2. Did you seek review of your first petition in the court of appeals? YES
   a. Date the petition was filed: UNK
   b. Result: DENIED
   c. Date the petition was

decided: UNK

d. Date the mandate was issued: UNK

3. Did you seek review of your first petition in the state supreme court?

a. Date the petition was filed: UNK

b. Result: DENIED

c. Date the petition was decided: UNK

d. Date the mandate was issued: UNK

D. SECOND STATE POST CONVICTION PROCEEDINGS

1. Did you file a second petition for post- conviction relief in the state court? YES

a. Name of court: MARICOPA COUNTY SUPERIOR

b. Date the notice of post conviction relief was filed: UNK

c. Date the petition was filed: UNK

d. Result: DENIED

e. Date the petition was decided: UNK

2. Did you seek review of your second petition in the court of appeals? YES

a. Date the petition was filed: UNK

b. Result: DENIED

c. Date the petition was decided: UNK

d. Date the mandate was issued: UNK

3. Did you seek review of your second petition in the state supreme court?

a. Date the petition was filed:
UNK

b. Result: DENIED

c. Date the petition was decided: UNK

d. Date the mandate was issued: UNK

E. OTHER STATE COURT PROCEEDINGS

1. Did you seek review of your conviction in any other state court proceeding?

a. Nature of the action:
SPECIAL ACTION HABEAS

b. Name of court:
MARICOPA COUNTY SUPERIOR

c. Date the action was filed: 09/1999

d. Result: DISMISSED

e. Date the action was decided: 09/1999

2. Did you seek review of the other action in the court of appeal? YES

a. Result: DENIED

b. Date the petition was decided: UNK

3. Did you seek review of the other action in the state supreme court? YES

a. Result: DENIED

b. Date the petition was decided: UNK

F. FEDERAL PROCEEDINGS

Is this your first federal petition for writ of habeas corpus challenging this conviction? NO

1. Name of court where the prior petition was filed: THIS COURT

2. Date the petition was filed: UNK

3. Case number of the prior action:
CV 94 2241/ CV 97 1437/ CV 99 1420

4. Date the action was decided: UNK

5. Did you raise any of the issues in this petition in your prior petition? YES
6. Was the prior petition Granted, Denied on the merits, OR
7. If the prior petition was denied, has the Ninth Circuit Court of Appeals granted permission to file a successive petition? NO

SECTIONS B THROUGH F CONTINUED

1. Arizona Supreme Court by order dated 11/19/98 in HC 98-0042 denied my petition for a writ of habeas corpus. By '"letter dated January 20, 1999, that court denied reconsideration.
2. On 11/24/98 the Arizona Supreme Court denied habeas HC 98 0052
3. Special Action 98-167 regarding executive clemency was denied by the Navajo County Superior Court on 11/27/98. Division One and the Arizona Supreme Court denied relief. See 1 CA CV 98 0695.
4. Navajo County Superior Court on 9/19/98 denied relief on destruction of evidence in CV 98 223. Division One denied relief in January 1999 in 1 CA CV 98 0648. The Arizona Supreme Court denied relief.
5. Navajo County Superior Court decided my procedural default claims in CV 98 0036. Division One and the Arizona Supreme Court denied relief. see 1 CA CV 99-
6. Arizona Supreme Court denied relief in Special Action M93 0014 1 CA SA 93 0044, M 93 0028, HC 93 0050, 1 CA SA 93 0071, 1 CA SA 93 0108, 1 CA SA 93 0109, M 94 0013, HC 94 0010.

7. Arizona Supreme Court denied relief in Petitions For Review 1 CA CR 94 0683PR, 1 CA SA 97 0308PR, 1 CA CR 95 0278PR, 1 CA CR 98 0102PR, 1 CA CR 98 0425PR, 1 CA CR 98 0770PR, 1 CA SA 93 0286, 1 CA HC 93 0011, 1 CA SA 94 0330, 1 CA HC 94 0012, 1 CA CR 95 0277PR, 1 CA CR 95 0288PR, M 96 0017, M 96 0036, HC 96 0028, 1 CA CR 94 0009, 1 CA CR 94 0010, 1 CA CR 94 0682PR, 1 CA CR 94 0683PR, M 96 0062, 1 CA CR 96 0060PR, 1 CA CR 96 0432PR, M 97 0003, 1 CA CR 96 0802PR, CV.97 44571 decided by the Pinal County Superior Court, 1 CA CR 96 D896PR, M 98 0022, 1 CA CR 97- 0546PR, 1 CA CR 97 0308PR, 2 CA.HC 97 0007.
8. As the Respondents have lost all my records, I am unable to provide the requested data about these cases.
9. The Respondents should be ordered to file "the entire trial, appellate and supreme court records" in these cases in Section B through F, as they are necessary for meaningful review of these claims.

G. PENDING PROCEEDINGS

Do you have any appeal, petition, application, motion, or other action currently pending regarding the conviction you are challenging in this petition? NO

H. REPRESENTATION

1. Preliminary hearing: APPOINTED
2. Arraignment and plea: APPOINTED
3. Trial/guilty plea: APPOINTED

4. Sentencing: APPOINTED
5. Direct Appeal: APPOINTED
6. First post-conviction petition: APPOINTED
7. Second post-conviction proceeding: APPOINTED

I. OTHER SENTENCES

Do you have any other sentences to serve after you complete the sentence imposed by the judgment you are challenging in this petition? NO

J. GROUND 1

1. My state conviction or sentence violates the following constitutional right or other federal law:

By losing the evidence and not making disclosure prior to trial, the state violated Brady and my 14th amendment rights

2. Supporting facts:

a. On 08/31/99 the State of Arizona made written findings that agents of the State had lost 80 pages of Brady materials not disclosed to me pretrial and a tape with interviews by two state employees [see investigation reports BO3023099 and BO4045099]

b. The 80 pages had handwritten notes, faxes, memos, affidavits etc, made by and received by the prosecution, Maricopa County Superior Court and State Insurance Department., that were not disclosed pretrial.

c. The tape had interviews given by an employee of the County Attorney and Insurance Department.

d. I presented the written report of the investigation and findings made by the State of Arizona, which evidenced the fact that the evidence did exist and was lost by the agents of the state of Arizona, to the Arizona Courts.

e. I had to present these, as the State admitted it

lost the evidence and there is no comparable evidence to the lost evidence.

f. The evidence which is described in 2 and 3 above, if presented to the Arizona Courts, would have invalidated my convictions, they support my claims of actual innocence, judicial bias, prosecutorial and judicial misconduct, manufacturing of crimes by the State, suboration of perjury and use of perjured evidence by the prosecution, benefits to witnesses given by the state, interference with my federal rights to confront witnesses and compulsory process.

g. Arizona Courts denied me relief.

h. The failure to disclose the evidence violated Brady and the loss denied me my Sixth and Fourteenth Amendment rights.

3. Exhaustion of State Court Remedies:

a. Did you present the issue raised in Ground 1 to the state supreme court?
YES

b. If you did present the issue to the state supreme court, was the issues presented:
OTHER: RULE 32
I presented this to the Arizona Courts by way of a Rule 32 and habeas.

J. GROUND 2

1. My state conviction or sentence violates the following constitutional right or other federal law:
ACTUAL INNOCENCE

2. Supporting facts:

a. I presented evidence in the form of affidavits and in the form of 801(d)(2) statements that support the fact that I am actually innocent of these crimes.

b. The Arizona Board of Executive Clemency declined to entertain my claims as under state law, I am barred from seeking review of claims by way of executive clemency until after my sentence.

c. I presented my claim to the Arizona Courts by way of a special action and relief was denied by way of special action. 1 CA CV 98 0695.

d. Arizona, effective December 1, 2000 added Rule 32.1(h) providing for review of actual innocence claims as per the Arizona Supreme Court, under Herrera v. Collins, 506 U.S. 390 (1993), these cannot be reviewed by way of federal habeas.

e. I presented my claim by way of Rule 32 and relief was denied as Arizona Courts stated that a Jury found me guilty, so they shall not address my claims of actual innocence

f. The Court of Appeals denied review in CA CR 01 0120PR.

g. Arizona Courts did not rely on clear, consistently applied and well established state procedural roles to relieving my claim and hence, under Martinez v. Klauser, Slip Opinion 00-35422 (9th Circuit September 12, 2001) and Wells v. Maas, 28 F.3d 1005, 1010 (9th Cir. 1994) the claim is subject to federal habeas review.

h. The refusal of the Arizona Court's to review my actual innocence claims offends Herrera v. Collins, 506 U.S. 390 (1993)

i. Arizona Courts have stated that "Finally, we note that Tripati used several pages of his brief to assert his innocence. We will not consider this claim on appeal."

j. Their reason for not considering this on appeal is "Tripati's guilt was previously determined by a jury."

k. Arizona Courts did not identify the correct legal principles of my claim.

FACTS THAT SUPPORT MY ACTUAL INNOCENCE CLAIM

l. I was convicted for asking a Robert Fred Girdley to post $4,000,000 in bailbonds. Mr. Girdley had 20 plus years of experience in the bonding business. It is contrary to basic common sense for anyone to say that an individual posted in excess of $4,000,000 in bail bonds, without first having the necessary security. No one ever does this and this just cannot happen.

m. The state contended I asked Helen Maureen Jones to post bail bonds. She gave affidavits confirming this to be false.

n. I was convicted of asking a Roger Rudman to post three bail bonds by misrepresentations. His lawyer, A. Melvin McDonald confirmed this not to be true.

o. I was accused of asking three real estate appraisers to submit fake appraisals. They stated I never did any such thing.

p. As John Naughton gave an affidavit stating he paid $4,000,000 to Mr. Girdley to post the bail bonds. This explains why

Mr. Girdley posted the bonds and hired Helen Jones as his agent.

q. The State expanded the charges against me, changed the theory of the case, changed the victims, changed the fraud etc.

r. Documents released by the State showed that the State did in fact manufacture the crimes, and the judiciary was actively involved in ensuring a conviction.

THE ARIZONA ATTORNEY GENERAL'S AFFIDAVIT

s. The Arizona Attorney General's Office submitted an affidavit confirming the fact that Judge Ronald Reinstein made calls, asking state employees to engage in conduct that is contrary to law. In fact, other documents that were subsequently disclosed, showed that Judges Ronald Reinstein, Jonathan H Schwartz, Gregory H Martin and Barry Schneider were involved in denyng me a fair trial and were involved in asking individuals to destroy evidence.

THE STATE INSURANCE DEPARTMENT DOCUMENTS

t. Documents from the Arizona Insurance Department also reflect the fact that Judge Ronald Reinstein made calls to ensure I was convicted.

WAIVER AND PRECLUSION

u. Arizona Courts did not find this waived/precluded.

3. Exhaustion of State Court Remedies:

a. Did you present the issue raised in Ground 2 to the state supreme court?
YES

b. If you did present the issue to the state supreme court, was the issues presented:
IN A DIRECT APPEAL
IN MY FIRST POST CONVICTION RELIEF PROCEEDING
IN MY SECOND POST CONVICTION RELIEF PROCEEDING
OTHER: RULE 32
CA CR 01 0120PR

WHEREFORE, Petitioner prays that the court will grant Petitioner the relief to which he may be entitled in this proceeding.
I declare under penalty of perjury that the foregoing is true and correct.
Executed on DATE: 10/26/2001

S/D_____
ANANT KUMAR TRIPATI

ROBERT FRED GIRDLEY
13870 BLACKJACK ROAD
AUBREY, TX 76227

April 6th, 1995

The Arizona Attorney General
1275 West Washington
Phoenix, AZ 76227

Dear Attorney General

I received $4,000,000 from John Naughton to post four bail bonds and informed Mr. Gunn McKay, Dean Chatfield, Teresa Archuleta and Donald Conrad of the Maricopa County Attorney as to this fact. They informed me if I did not blame Mr. Anant Kumar Tripati of Legal Research Associates as the person who hired me and asked me to post the four bail bonds, I shall be charged with crimes in Arizona.

Once I was granted absolute immunity from prosecution and told Helen Maureen Jones shall not be prosecuted I did what I was asked to and blamed Mr. Tripati.

Even though the documents were given to me by Mr.

John Naughton I blamed Mr. Tripati as requested by Mr. Conrad and Chatfield.

I am informing you that Mr. Tripati did not ask me to post any bail bonds and any assertions by the State to the country are false. Had I not been threaten and given immunity I would not have blamed Mr. Tripati, I did this to save having to pay the county money for the bonds and escape criminal prosecution.

Very Truly,

S/D_____

ROBERT FRED GIRDLEY

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COUNTY CLERK

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Bear No. 004482

Attorneys for Defendant Helen Maureen Jones

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

	)	No. CIV-93-2204
	)	PHX-ROS
Anant Kumar Tripati,	)	
Plaintiff,	)	
vs.	)	
	)	**AFFIDAVIT OF**
ROBERT F. GIRDLEY, et al.,	)	**HELEN**
Defendants.	)	**MAUREEN**
	)	**JONES**

STATE OF ARIZONA	)	
	)	ss.
County of Maricopa	)	

Helen Maureen Jones, first duly sworn, deposes and says:

1. A. Robert Fred Girdley contacted me via Telephone and advised me that he was the Managing General Agent of an entity called Financial Security Assurance Co., Inc. (FSAI). He asked me to participate with him in the bail bond business under the name Bondco. He told me Bondco did not have to be licensed by the Arizona Department of insurance. We proceeded to post bonds using the name Bondco.
2. Me. Robert Fred Girdley provided me with the necessary bonding documents as well as the qualifying power of attorney forms, which I used to post bail bonds with.
3. Mr. Tripati never asked me to post any bail bonds.
4. Before testifying for the state of Arizona, I had numerous conversations with Donald E. Conrad that my cooperation with the State of Arizona was necessary in the prosecution of Mr. Tripati. I was never required to pay the $140, 00.00. I was not charged by the State of Arizona, nor was any official action by the State taken against me that affected me personally or my bail bond license.

S/D

HELEN MAUREEN JONES

Subscribed and sworn to before me this 10 day of September 1996.

S/D

_____

Notary Public

COTTER & COMPANY

July 22, 1993

Vida Zoe Flores
Attorney at Law
10801 North 45th Street
Phoenix, AZ 85028

Dear Ms. Vida Zoe Flores:

"I informed Mr. Conrad and Chatfield that Mr. Tripati did not ask me to arrive at the $5,000,000 value and that Mr. Tripati did not know the real estate in Riverside County was not worth $5,000,000. I also informed them that I made a mistake."
"They shut off the interview tapes and repeatedly threatened me with criminal prosecution. Mr. Conrad told me that if I testified for Mr. Tripati, I will be prosecuted."
"I called Mr. Conrad back after we talked and he told me, I must not come and testify as a witness for you and once again confirmed that he will prosecute me, if I testified."
"Based on these threats by Mr. Conrad, I am unable to testify as a witness for you. I want you to know that Mr. Tripati did not know the value [of the property] was incorrect."

Sincerely,

FRANK COTTER, Senior Certified Professional Appraiser

ROM CONTROLLED SUBSTANCES
MARICOPA COUNTY ATTORNEY'S OFFICE DRAFT
MEMORANDUM

TO:	Don Conrad
FROM:	Teresa Archuleta
REASON:	Tripati, Ananti
	File # 92-043
DATE:	June 16, 1993

Richard Goldston has agreed to confirm he authorized Dean to arrest Tripati. According to him, he is willing to execute whatever we need, to show he conducted the search and seizure. He states the only problem we have is that we received the items on June 24, 1992, Mr. Goldston states he did what you asked and did not inform the California Judge the seized items were already in Arizona, when he asked her for an order permitting the transfer.

The Superior Court has agreed to remove the original bond papers from the files until after the trial. I checked with the forfeiture section and they say they will not do anything in regards to the forfeiture of the four bail bonds, as long as Mr. Girdley and Mrs. Jones testify. The Clerk's office has agreed not to send any papers in this regards.

According to the Insurance Department, Mrs. Jones was authorized to post bonds, not to exceed $10,000 under her license. They say she violated state insurance laws by using her insurance to post the bail bonds for BONDCO. As requested by Judge Ronald Reinstien, Gunn and yourself, they have agreed not to do anything to Mrs. Jones and Mr. Girdley, as they will testify against Tripati. They have agreed to send someone, not familiar with licensing procedures, to testify as a witness.

Mr. Frank Cotter called today regarding testifying for Tripati. I reminded him if he were to testify that Tripati did not ask him to inflate the appraisals, he shall be prosecuted. I told him he should not come and testify as a witness.

I reminded Mrs. Jones not to testify to the version of facts she gave. Vida Florez on the 13th of June. She knows if she were to give the version she gave to Vida Florez, she will have to pay $140,000 and will be prosecuted. She understands this.

John Naughton's affidavit arrived today with the $4,000,000 receipt issued by Mr. Girdley. As instructed these are not in the Tripati file.

John Naughton's affidavit arrived today with the $4,000,000 receipt issued by Mr. Girdley. As instructed these are not in the Tripati file.

The 85 insurance companies contend Girdley defrauded them and they believe Girdley did the same in this case. There may be a 404/405 issue here. These documents are not in the file. I have them at home.

TERESA ARCHULETA
PAGE 1

ALRIGHT TERESA, I AM GOING TO TAPE THIS INTERVIEW AND I AM TAPING THIS UPON YOUR REQUEST. TODAY'S DATE IS 08-15-94, THE TIME IS NOW 17:05. INTERVIEWD BY ROBERT SAVAGE.

Q. Teresa, is it true, you are employed by the Maricopa County Attorney's Office, are familiar with the Tripati case, State of Arizona v. Anant Kumar Tripati CR 92 08576 and CR 92 0920 and are giving this interview, with hopes, of clearing your conscience about what was done in that case?

A. You are basically correct

Q. Have you talked to Mr. Tripati?

A. I have talked to him at least 15 times about various matters, such as the polices of the county, the Lopez case, his arrest, the search and seizure, etc.

Q. Why is it that the county arrested him?

A. He was creating a lot of waves and I told him so. Has he listened to me, he would not have been arrested and his property would not, have been seized.

Q. Is it true that more than $150,000 pages of documents and other software was seized from his office?

A. We seized more than $150,000 pages of documents and other software programs. I destroyed all this because Don asked me to.

Q. Don, you mean Donald E. Conrad?

A. Yes

Q. Why were these documents very important?

A. They were handwritten notes and other documents our office created which showed various practices in Haricopa County. With the documents, there would have been chaos. Many of the criminal convictions would have been vacated, had the documents been released. The documents show our true color.

Q. When did you destroy these documents?

A. I talked to Jeff Bernick of Ridenour Swanson Claera & Evans and he advised me to destroy the documents because we had waived all objections in Federal Court and if the documents were disclosed it would adversely affect us. I talked to Gerald Grant and Don Conrad as well as Gunn McKay and they all agreed that destruction of the documents was the best thing to do.

Q. Who arrested Mr. Tripati?

A. Dean Chatfield, Donald E. Conrad, Terry Blake and Jose Soto went to arrest him and search his office. Dean arrested him, searched his office, seized the items and bought them to Arizona. When Mr. Tripati began challenging the authority of Dean to arrest him and search his office, I called Richard Goldston. Richard Goldston stated he will be willing to cover for us. He agreed he would say he arrested him, he searched the office and he seized the items.

Q. Was there a California court order allowing the arrest, search and seizure?

A. On July 1, 1992, we got an order to take custody of the items, but we already had the items on June 24, 1992. There was no order when we seized the items. I know this is an issue in the RULE 32. Judge Schwartz will take care of us. I am sure he will find we had authority, though we did not.

Q. What about the real estate appraisals and the real estate?

A. Dean, Don and I had extensive discussions with Gunn on the matter. Don plainly advised Frank Cotter, one of the appraisers that if he were to testify that Mr. Tripati did not ask him to inflate the values, he would be prosecuted. I talked to him and he has repeatedly Mr. Tripati did not ask him to inflate the values. Before the arrest; I had discussions with Mr. Tripati about the appraisals. He told me, he was no real estate guy, but if he wanted our own appraiser to appraise the property, he would pay for it. Based on my discussions with him I know he did not ask for inflated values and know the values were wrong.

Q. Are you saying Mr. Frank Cotter was told by Don Conrad not to testify?

A. Correct. Don told him in very simple terms that if he was to testify, he would charge him. I believe he should have been allowed to testify.

Q. What about Robert Means?

A. What Mr. Means did not tell the jury was the fact that Mr. Tripati had no way of knowing the real estate was not worth as appraised. Don, Gunn, Dean and I, deliberately used Mr. Means, because it was our intention to

mislead the jury into believing otherwise. Mr. Tripati has correctly stated in his Rule 32 that a real estate expert should have been used, as the expert testimony would have changed the verdict. Mr. Dhillon correctly stated Mr. Tripati did not know about value of the property. I know for certain he did not, and this is on our discussions, when the property was being used.

Q. What about the documents used to post the bonds?

A. They are exactly the same as what Jones used all three years. The type prints on them match those filed in court before. They were not given or created by Mr. Tripati, we did examine the documents created by Mrs. Jones and Mr. Girdley and the documents used to post the bonds, patch the examines documents.

Q. Did you talk to Mrs. Jones?

A. Mrs. Jones posted the bonds before she talked to Mr. Tripati. She did state in very clear terms that Mr. Tripati did not ask her to do anything but, when he found out, he stopped her loss. Before her testimony, Don talked to her. When she advised Don as to what she was going to testify to, Don told her, he would

arrest and prosecute her, take away her license and have the State Department of Insurance act against her. He also told her, she would have to pay the $140,000. She changed her testimony, to save paying the money.

Q. Was an immunity agreement worked out with Jones and Girdley?

A. Don, Gunn, Dean and I, contacted the Superior Court and made arrangements for the $140,000. Calderon bond not to be forfeited. Our records show Judge Reinstein, agreed to this. We also talked to the Insurance Department and asked them not to take any administrative or civil actions against Jones and Girdley. Don contracted the Insurance Department and asked them not to present witnesses who could testify to the fact that BONDCO violated state insurance laws and Jones could not do what she did. We also told Jones and Girdley they will not be prosecuted. All this had to be done, to make certain, Jones and Girdley testified. I think you can say there was an informal agreement.

Q. What about the background of Girdley?

A. Our records show we found Girdley has had a history of engaging in exactly the same type of

conduct, posting fake bail bonds and changing business names. We were fortunate Judge Schwartz excluded the evidence.

Q. Did Judge Schwartz and Reinstein agree to fix their decisions as alleged by Mr. Tripati?

A. I don't know about fixing decisions. What I do know is that Don and Gunn had both stated they were assured a conviction. Based on what I have seen, it would be correct to assume they did agree to fix the case. The Court had a stake in ensuring convictions were obtained.

Q. Do you believe Girdley was paid?

A. I have seen the witness interview that John Naughton gave to Dean Chatfield. That interview shows Girdley was paid $4,000. It is logical to believe he was paid as no one would post $4,000,000 in bonds without first getting paid. Girdley is a slick man abd what he says just does not add up. No way he did not get paid.

Q. If the court were to order production of all notes, what will they show?

A. Notes prepared by Don, Gunn, Dean, Gerry, myself, Vince, all show Don, Gunn, and I

manufactured the case. With notes, one thing is certain, there will be no convictions. They are Brady materials.

ARIZONA DEPARTMENT OF CORRECTIONS

MEMORANDUM

TO: Terry L Stewart, Director
FROM: Frank Johnson, RMI
DATE: January 18, 2000
SUBJECT: Anant Kumar Tripati v. State of Arizona

I have concluded after further investigations into the allegations made by inmate Tripati, ADC * 102081 regarding the loss of 80 pages, a tape with two witness interviews, 9 boxes, fan, typewriter, and other materials and have made the determination that this inmate must be compensated for the loss. The Superior Court denied the Rule'32 filed by the inmate as he was unable to produce the 80 pages and tape lost by the Department.

The Attorney General's Office must settle inmate Tripati's claims ASAP. This case is especially serious because the evidence lost,*prevents the inmate from obtaining his release from custody and there are no duplicates available.

As the State has lost the tape and SO pages plus the other items of property, the Department must do all it can to ensure the inmate obtains the necessary hearing in,his Rule 32 without the 80 pages and tape because the inmate was not at fault in this matter.

Cc: Darla Elliott, Warden, ASPC-Perryville Inmate Tripati 102081

RECEIVED
Jan 21 2000
ARIZONA STATE PRISON
PERRYVILLE

RECEIVED
NOV 29 1999
ARIZONA STATE PRISON
PERRYVILLE

ARIZONA DEPARTMENT OF CORRECTIONS
MEMORANDUM

TO: Terry L. Stewart, Director

FROM: [signature not legible]

SUBJECT: Tripati, Anant Kumar # 102081

DATE: 24 NOV 1999

Tripati, Anant Kumar # 102081

I have reviewed the claims made by I/m Tripati reviewed documents interviewed staff and inmates in the process. The Dept. did in fact lose the 80 pages- 9 boxes interview tape typewriter fan and clothes. I contacted the County Attorneys Office and also the AG's Office regarding this matter. They are concerned as they believe I/m Tripati may be released if the matter is not resolved as soon as possible.
Too many inmates are losing their property/legal materials in the Santa Cruz Unit Inmates Palomino 120586/ Radley 137770/ Minehart 133002/ Monroe 133337/ Ekmanis 56522 have lost their legal materials/property. This is because responsible staff are not handling legal materials/property in accordance with policy. As the dept. has lost I/m Tripati's property he should be reimbursed. When I interviewed the

inmate I got the distinct impression the inmate would settle the matter if some sort of letter is mailed to the proper courts explaining the loss and replacing the lost items. I think such a letter should be sent to Wardon Elliot or CO IV Gabbert as the inmate feels these two people have been very fair to him and CO III Gilbert tried to coverup. If this is not settled soon it may prove to be very fatal to the department.

ARIZONA DEPARTMENT OF CORRECTIONS

INMATE RESPONSE LETTER

INMATE NAME: Tripati, Anant Kumar

ADC: 102081

INSTITUTION/UNIT: ASPC-PV- Santa Cruz Unit

FROM: Michael J. Dominiak, D.W.

LOCATION: ASPC-PV-ADMIN

DATE: 9-7-99

Response to your letter inmate letter dated 8/26/99, subject "missing papers"

This issue was resolved through use of grievance process. A recommendation to reimburse you has been made to the appropriate department.

S/D_____
MICHAEL DOMINIAK 9/7/99

ARIZONA DEPARTMENT OF CORRECTIONS

INMATE RESPONSE LETTER

INMATE NAME: Tripati, Anant Kumar

ADC: 102081

INSTITUTION/UNIT: ASPC-PV- Santa Cruz Unit

FROM: Darla Elliot Warden

LOCATION: ASPC-PV-CX

DATE: 8-25-99

In response to your letter dated 7/27/99 concerning the resource Library. This issue has been taken care of through the grievance process. We were unable to locate your documents at ASPC-Perryville. The grievance coordinator has recommended reimbursement to replace the documents in question. You must now wait for the process to be completed through risk management.

S/D_____
DARLA ELLIOT

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

CR 92-08576/
CR 92-09620

Plaintiff,

ANANT KUMAR TRIPATI,

Defendant,

AFFIDAVIT OF STANLEY MCGINTY

[Honorable Jonathan H Schwartz presiding]

STANLEY MCGINTY, first duly sworn upon oath states that he is competent to testify to the contents of this affidavit and that the contents of the affidavit are true and correct:

1. I do not know, have never met and have had no dealings with Anant Kumar Tripati, ever.

2. I am a Computer Specialist and hence make the statements in this affidavit, based on my professional experience, training and expertise.

3. Unless and until, a computer has security access, one cannot. state, who created the documents in a computer, or who authorized the creation of the documents in a computer. The mere fact, an initial appears when the document is saved, does not mean the person, authorized the

creation of the documents.

4. No person, knows the contents of each and every document on a floppy- disk, unless access to the disk, is restricted to that person only. The mere fact a person loads a floppy disk onto a computer harddrive, does not mean the person, was aware what the disk contained

5. No person, can look at a fax and say who sent a fax and no person can look at postage removed from a postage meter and say who removed teh postage. Only, if a fax and postage meter has restricted, use, can one say who sent the fax and placed the postage.

6. Any statements, that, in an office used by 6 people, with everybody having access to computers, faxes, postage meter, a set of documents were created by Anant Kumar Tripati or were created with his knowledge, is only speculation. Likewise, to state, that a fax was sent by Mr. Tripati from such an office and that postage was placed by Mr. Tripati in such an office, is only speculation

S/D_____
STANLEY MCGINTY
717 S. Mill Ave. # 219, Tempe, AZ

Subscribed and sworn to before me on 04-30-1997 by
STANLEY MCGINTY
S/D_____
PATRICIA ROBLES,
Notary Public

FREDERICK A. ROMERO
ATTORNEY AT LAW
POST OFFICE BOX 70662
PASADENA, CALIFORNIA 91117
(213) 880-0924

APRIL 30, 2007

DORA SCHRIRO
DIRECTOR
ARIZONA DEPARTMAENT
OF CORRECTIONS
1601 WEST JEFFERSON
PHOENIX, AZ 85007

Dear DORA SCHRIRO,

RE: TRIPATI, ANANT KUMAR
ADOC # 102081
CLASS ACTION

I am contemplating associating counsel in Arizona to file a class action on behalf of my client and 175 other inmates in Cook Unit but before doing so I wish to bring the issues to your attention with the expectation they are resolved.

It appears after you became privy to the fact that Warden John Ontiveros had ordered an investigation and obtained the attached report, you asked Mr. Ontiveros to resign. It looks like you had him resign for he refused to cover-up the falsification of evidence by the Arizona Attorney General's staff

with the assistance of your employees. This falsification was necessary to protect Judges Ronald Reinstein, Jonathan Schwartz and Gregory Martin. Towards this end, you manufactured reasons for his resignation.

By this letter 1 am requesting copies of all documents, 1/R's, emails, memos, faxes, notes etc_ the ADOC has which refer to Anant Kumar Tripati # 102081 and the two page memo.

Even though it is well established that the duration of attorney visits cannot be restricted, I am surprised your Associate Deputy Warden Carlos Manriquez restricted my attorney visit for March 23, 2007, to two hours. As such I refused the visit. To get an attorney visit in Cook Unit, I have to make numerous calls.

I have since 1989 been Counsel for Tripati. In Alhambra, Central Unit; Winslow, Santa Cruz; Lumley and Barchey units; CO III's were in their office between 8am and 3pm. At no time have I had any problem speaking to Tripati. It generally took 15 minutes after I called to get a call back.

Co III Margaret Baldanegro is rarely, if ever, available. I usually have to make 10 to 12 attempts to get a legal call. I am not complaining about Baldanegro, per se, she apparently is very busy, but I am complaining about her lack of back-up or of voice mail capability.

In fact, the situation is so bad that my client has

been unable to call his parents and daughters although such calls are authorized by the Warden.

I understand though physically present in Cook Unit the CO III's in Cook Unit generally are not in their offices. As Co IIIs under your system are the facilitators for every inmate issue, they should be in their offices during their work hours or should have back up assistance or voice mail.

I understand that your new Complex Warden Robert Stewart has covered up theft of property by Officer Robert Waldron Jr...Deputy Warden, Carl Toers Bijns, ordered property Officer, Waldron to locate my client's property, which Mr. Waldron admitted to Mr. ToersBijns, Captain Higginson, and to SSU Uehling that he could not find the property. Mr. Waldron stole separate and unrelated ADOC property and gave such property to Mr. Tripati. He then submitted reports stating he found Mr. Tripati's property. Delivery receipts and purchase orders show this property belongs to Eyman Complex.

Associate Deputy Warden Manriquez as retaliation for my client reporting this to the administration directed Mr. Waldron to issue a disciplinary ticket against my client. Mr. Manriquez also directed how the issue should be decided. Sergeant Green followed Mr. Manriquez's directions. Mr. Manriquez, as the Associate Deputy Warden, reviews inmate appeals. As such he cannot direct how a particular issue should be decided.

During the disciplinary process your SSU gave a witness statement that there have been numerous complaints against officers Waldron and Clemente for mishandling mail and property. It is surprising that they are allowed to continue mail and property duties despite the many complaints against them.

Another area where Cook Unit and employees stray from ADOC policy is access to legal resources. In every Unit, inmates have access to computers, printers, and videos for religious and educational activities. However, for legal work, inmates are not allowed access to these resources. Also, inmates are allowed unlimited number of books for education, a Banker's Box full of religious books, plus 7 books. Other units place no limitations on the number of law books. In every unit inmates are allowed the Los Angeles Daily Journal which publishes full text court decisions. In Cook Unit this publication is forbidden by order of Daryl Johnson in Cook Unit. It makes no sense to restrict law books while allowing unlimited education-related books, religious materials and publications.

I have not written a single letter to the ADOC concerning my client from 1992 to February 2006. However, since February 2006, while my client has been in Cook Unit I have now been forced to correspond on more than one occasion. Numerous letters have been written by me, Mr. Tripati's daughter Dr. Aradhna Tripati, and his family and friends.

Based on the numerous times these issues have been brought to light coupled with the usual boiler plate response by your office, and the failure to take corrective action, I feel that am inclined to associate local counsel and file a class action against you and the Cook Unit administration. I believe I have at least 175 inmates with complaints similar to that which my client has. I am asking the following corrective action:

The practice followed in every ADOC Unit be followed and CO IIIs be directed to be available to inmates 5 days a week in their office. If they happen to be sick or on vacation or unavailable, someone else perform their tasks as is done in each ADOC Unit or that voice mail be made available.

I also ask that Carlos Manriquez be ordered not to interfere with attorney visits.

As there have been too many complaints against Waldron and Clemente for stealing mail and property and CO III Diane Bullock for using the grievance process to cover this up, these individuals should be reassigned so that they do not handle mail and property.

You personally review my grievance appeals and rejected grievances filed by my client. The prior responses that have been given by those delegated by you clearly appear to be are a white-wash and speak of "cover-up" by your office.

In light of your policy allowing computers, printers, videos, unlimited books,

publications for religion and education activities, the policy of restricting similar materials for legal access clearly serves no security interest and nor does it serve any legitimate correctional goal. As such, for legal work, inmates should be allowed the same access they receive for religion and education.

As you do know, you can not ask any employee to resign as your vehicle to retaliate against that employee for refusing to cover-up for you. In light of your action against Caldron, Ontiveros, I am researching the possibility of an action by my client against you. This issue is so serious that it must be resolved. I ask that the other issues be looked into.

The purpose of your grievance process in theory is to save judicial and agency resources. Any person with legal training, who reviews the responses given to my client by your office, will clearly agree, you are forcing litigation. This causes substantial resources to be spent by the court, state, and my client.

As Tripati has no assets or funds, his family, friends and supporters continue to support him. If I do not hear from you within 30 days, I will proceed with my plans to protect my client's legal rights.

I hope the issues are resolved.

Yours truly,

S/D

FREDERICK A. ROMERO

ATTORNEY AT LAW
POST OFFICE BOX 70662
PASADENA, CALIFORNIA 91117
(213) 880-0924

CC: Bernie Rollins, Regional Director
Robert Stewart, Complex Warden
Tara Diaz, Deputy Warden
Carl ToresBijns, Deputy Warden
Michael Brodsky

ARIZONA DEPARTMENT OF CORRECTIONS

MEMORANDUM

DATE: December 20, 2006

TO: John Ontiveros, Warden Eyman Complex

FROM: (signature illegible)

SUBJECT: Report and Reccomendation Anant Tripati #102081

At your request, I conducted an investigation. After interviewing a number of staff members and reviewing the documentation listed, I offer the following conclusions and recommendations.

1) The inmate Letter Responses and other documentation support the contents of the Information Reports. However, there is a gap in continuity because of undocumented oral and informal communication between staff members and the Attorney Generals Office and the judicial officers who those staff members consulted. Had the Department required staff members to record such contacts (e.g. a memorandum containing date and substance of conversation it would not have been possible for anyone to falsify or destroy official records without leaving a trail we could follow to the source.

2. Policy allows inmates to keep a boxful of religious articles, including books. Policy also allows inmates to have an unlimited number of books for

educational purposes and, as well, ready access to compact disks, computers, printers, videotape and such. However, policy restricts the number of law books an inmate may have and absolutely (illegible) any computer access for doing legal work. Although records show inmate Tripati was granted an exception to this policy for his law books, records also show Deputy Warden Arnold did not honor the agreement at the Cook Unit. This disparity needs to be addressed.

3.After inmate Tripati petitioned the courts for a contempt order, COIII Bullock alteredhis property recordsss. This was done at the direction of Daryl Johnson and Paul Carter.

4. I can see where COIV Tucker and/or Deputy Warden Arnold were responsible for denying inmate Tripati's requests to call his attorney by telephone. However, nowhere in the documentation I reviewed could I find what their reasons were. If the Department is going to deny an inmate contact with his or her attorney, a record must be kept to show that there was a legitimate reason for infringing on the attorney-client privilege (for example institutional security).

5. Just as detailed records must be kept with regard to legal telephone calls, records must be kept, just as meticulously, to show why an inmates access to his stored legal materials or to the mails is being restricted. Although inmates Tripati's complaints were numerous, I cannot find any documented reason given why staff would have been <u>legitimately</u> restricting inmate Tripati's legal mail or denying him access to his legal materials. This is a widespread problem. I would

suggest that the problem be investigated further as to all inmates at the Cook Unit.

6. It seems to me that inmate Tripati's complaints against Victor Rubeyianes were dismissed out of hand, without any investigation whatsoever. Any time a staff member endangers the safety of an inmate by labeling him a "snitch", a full inquiry must be made. The incident of which inmate Tripati complains did not happen between only him and Rubeyianes, but involved other inmates. The absence of any witness statements from any of these inmates tells me that the matter was not investigated- that inmate Tripati's complaint was dismissed upon Rubeyianes denial of any wrongdoing. Of relevance also would be a statement as to whether Rubeyianes has a history of harassing or retaliating against inmates; but there is no such information provided. This lack of information suggests a cover-up.

7. I am also persuaded by the evidence (especially from the handwriting expert) that Rubeyianes lost inmate Tripati's legal documents. Why was the investigation terminated after Rubeyianes denied losing them? Again the lack of investigation suggests a cover-up.

8. D.O. 802 says that the Inmate Grievance System is supposed to provide the Departments inmates a timely administrative remedy to resolve complaints that "might otherwise unnecessarily burden the courts". A review of the grievances filed by inmate Tripati reveals that he has consistently utilized the grievance process to resolve his complaints. But a

review of the responses to these grievances and appeals show a disturbing pattern of not resolving his complaints at the administrative level, almost as if no thought were being given to preventing the wave of litigation inmate Tripati is most capable of bringing. Again, this is a systemic (illegible). I would suggest that all of inmate Tripati's Inmate Grievances be resolved re(illegible)d and that secondly, that the problem be investigated further as to all inmates at the Cook Unit. Cook Unit Staff must not reject grievances filed by inmates as a vehicle to cover-up for staff.

Documentation Considered for Report and Recommendations

Letters from attorney, Mr. Fredrick A. Romero

Letters from Dr. Aradhna Tripati

Letters from Mr. Glen Markiri

Letters from Mr. William Liebman

Letters from Mr. John Culver

Declaration of Ms. Patricia Fisher. June 26, 2006

Information Reports dated 10/29/99, 03/08/06

Inmate Letter dated 11/21/03 (with added note dated 11/06/04)

Inmate Letter Responses dated 11/17/03, 04/06/01, 04/25/01, and 11/19/97

File maintained by C.I.U.

File maintained by Deputy Wardens (Barchey and Cook Unit)

Files maintained by Wardens (Lewis Complex and Eyman Complex)

File maintained by A.D.C.'s Legal Services

File maintained by Central Office

98 e-mails between A.D.C. employees

145 e-mails between A.D.C. staff and The Attorney General's Office

Grievance Records

Arizona Department of Corrections

Report # [blank]
Information Report

Report Date 10-29-99

Page ONE of ONE
To (first line supervisor)
Title Unit
Charles Ryan
Dep Director --------
From (print)
Title Unit
[Jerry/Larry] White CO II
B03
Subject
Judy Gabbert CO IV
Staff Involved
Staff Name (last, first, MI) Title
Badge Number
Judy Gabbert CO IV
[blank]
Inmates Involved
Inmates Name (Last, First, MI) ADC # Unit
HU/Bed
Tripati, Anant, K 102081 B03
14-240
Time Date Location
18:30 10-29-99 B03

Summary
CO IV Gabbert informed me Judge Reinstein called wants all records of 80 pages & tape destroyed. Per CO IV judge will make certain Dep* s not held accountable and when the time comes will speak to other judges about matter. Advise CO IV this cannot de done because I/M has copies and staff lost T-xxis CO IV ordered me to change records & destroy originals. I refused to obey order

Signature
[Jerry/Larry] White

Comments/Actions Taken

See separate memo, spoke to judge Ron Reinstein, Jonathon Schwartz, Gregory Martin and S. Christopher Copple. They want documents destroyed per all judges, Judge Scneider will dismiss civ. 99-20757 Dept. is protected
Signature
Date
R*** z
Nov 25 - 99

JANET NAPOLITANO
Attorney General

Kelly J. Montissey (016158)
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DS99-0728/RM #99-67100

Attorneys for Defendant

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

	)	No. CIV-99-20757
	)	AFFIDAVIT OF JUDY
Anant Kumar Tripati,	)	GABBERT
Plaintiff,	)	
vs.	)	
	)	Assigned to the
State of Arizona, et al.,	)	Honorable
et al.,	)	(Colleen A. Mc.Nally)
Defendants.	)	
	)	

STATE OF ARIZONA)
)
County of Maricopa)

JUDY GABBERT, being first duty sworn, upon her oath deposes and says:

1. I am employed by the Arizona Department of Corrections ("ADOC") as a CO IV at the Arizona State Prison Complex-Perryville. I am competent to testify to the matters contained herein and this Affidavit is made on my own personal knowledge.

2. On November 15, 1999, I authored the attached memo to Cindy Neese who is employed in the Business Office of the ASPC-Perryville (See Exhibit 1.)

3. The attached memo was prepared to Inform Ms. Neese of the results of an investigation conducted Info Inmate Tripti's claim that ADOC staff lost 9 of his legal boxes and for her use in the processing of inmate Tripati's grievance.

AFFIANT SAITH NAUGHT

S/D

_____

JUDY GABBER

SUBSCRIBED AND SWORN TO before me this 28th day of June 2001.

S/D

_____

NOTARY PUBLIC

207D
DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED
SEP 21 2001
GLEN O CLARK,

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	1 CA-CR 01-0120PR
	)	
STATE OF ARIZONA,	)	DEPARTMENT C
Respondent,	)	
v.	)	MARICOPA County
	)	Superior Court
Anant Kumar Tripati,	)	Nos. CR 92-08576
Petitioner,	)	CR-09620
	)	
	)	O R D E R

Presiding Judge Susan A. Ehrlich and Judges Rebecca White Berch and Ann A. Scott Timmer have considered this petition for review from the trial court's denial of post-conviction relief.

IT IS ORDERED denying review.

DATED this 21st day of September, 2001

S/D

Susan A. Ehrlich
PRESIDING JUDGE

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/04/1999
CLERK OF THE COURT

FORM R00A

HONORABLE GREGORY MARTIN

CR 1992-008576; CR 4992-009620; CR 1999-012040

FILED: November 10 1999

GERALD R. GRANT

STATE OF ARIZONA

V.
ANANTI KUMAR TRIPATI

ANANT KUMAR TRIPATI
ADOC NO 102081
PO BOX 3200
GOODYEAR AZ
8533-0000

APPEALS-CCC
VICTIM WITNESS
DIVISION COUNTY
ATTORNEY
PHOENIX, AZ
00000-

The Court is in receipt of the defendant's most recent post-conviction relief pleading. It is entitled "Application for Writ of Habeas Corpus" but is, in effect, another petition for post-conviction relief under rule 32. The Court has reviewed this pleading and the court files.

There are now approximately 65 volumes to the court's file in CR92-08576 and another 30 volumes to the court's file in defendant's continuous and persistent attempts to obtain post-conviction relief in his case through the filing of petition under Rule 32. To date all the previous petitions have been
dismissed. His convictions and sentences were also affirmed on direct appeal.

This petition again alleges that the State has lost or willfully destroyed evidence in the defendant's case which would have changed the jury's verdict.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/04/1999 CLERK OF THE COURT

FORM R00A

HONORABLE GREGORY MARTIN

K. A.bott

Deputy

CR 1992-008576; CR 4992-009620; CR 1999-012040

Much of what the defendant contends now has been presented in earlier proceedings but in a different fashion. The defendant has claimed before that the State lost a tape of an interview of a paralegal at the Maricopa County Attorney's Office, who is now deceased, which evidenced corruption on the part of the prosecution and the judiciary which contributed to the convictions of the defendant in these cases. The defendant has asserted that this tape, the only tape in existence evidencing any of this, was intended for mailing by DOC personnel to the Maricopa County Attorney's Office and was lost by the County Attorney. The Court summarily dismissed this petition based on the entire history of this case and an affidavit from Dan Sands, an investigator at the County Attorney's Office, which said that the tape received, contained nothing but music.

The defendant now claims that DOC must have

switched tapes and admits that, indeed, a music tape was sent to Mr. Sands and the important evidence tape to someone or someplace unknown.
The defendant also claims that an affidavit from the paralegal corroborating the contents of the tape along with other important documentation supporting his, claim for relief were also lost by DOC.

As with all the other similar claims raised by the defendant, the defendant offers no affidavit or other credible evidence which supports any of his allegations or which would, in colorable entitling him to- further post-conviction relief proceedings. This is a defendant who has been convicted of numerous and sophisticated fraud schemes, who has been sentenced to lengthy prison sentences in these cases, and who has, in the past, been guilty of abusing his access to the courts at all levels by filing vexatious, harassing claims for relief often supported by fraudulent, bogus, and manufactured evidence. This pleading, the Court concludes, is another like all thc rest proceeding it.

IT IS ORDERED dismissing this application or petition.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/04/2002

FILED
10/08/2002
CLERK OF THE COURT
FORM R00A

HONORABLE THOMAS W. O'TOOLE

M. Cearfoss
Deputy

CR 1992-008576;
CR 1992-009620

FILED:

GERALD R. GRANT

STATE OF ARIZONA

V.
ANANTI KUMAR TRIPATI

ANANT KUMAR TRIPATI
ADOC NO 102081
PO BOX 3200
BUCKEYE AZ
85326-0000

APPEALS-PCR-CCC
VICTIM SERVICES
DIV-CA-CCC

MINUTE ENTRY

Defendant filed on September 16, 2002, a successive, Notice of Post-Conviction Relief, claiming that a recent article in the Arizona Republic reporting a judge's comment that "if you have the right attorney you can get what you want from the -County Attorney's Office," is newly discovered evidence applicable to his case. He claims that the Court should have informed him that he did not have the right attorney, and if he had been told, he would have hired the right attorney, and been acquitted. Defendant's assertion is not, newly discovered evidence that entitles him to raise an untimely claim and to a hearing under Rule 32.1(e) of the Arizona Rules of Criminal Procedure. *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied.

. . .

IT IS THEREFORE' ORDERED dismissing defendant's Notice of Post-Conviction Relief.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1992-008576; 09/02/2003
CR 1992-009620

HONORABLE EDDWARD BALLINGER, JR.

CLERK OF THE COURT
R. Luiszer
DEPUTY

FILED: 09/04/2003

GERALD R. GRANT

STATE OF ARIZONA

V.

ANANTI KUMAR TRIPATI

ANANT KUMAR TRIPATI
ADOC NO 102081
PO BOX 3200
BUCKEYE AZ
85326-0000

APPEALS-PCR-CCC
COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

Defendant filed on August 19; 2003 a successive Notice of Post-Conviction Relief He claims that Judge O'Toole's orders dismissing prior notices were ex-parte and entered after ex-parte discussions with other judges, and therefore should be set aside. Pursuant to Rule 32.2(b), Arizona Rules Of Criminal Procedure, the court is authorized to summarily dismiss a Notice of Post-Conviction Relief that fails to comply with the requirements of Rule 32.4(a). Rule 32.4(a) provides that any notice not timely filed may only raise claims pursuant to Rule.32.1(d), (e), (f), (g) or (h). Defendant's claim does not come within one of these exceptions.

IT IS THEREFORE ORDERED dismissing defendant's Notice of Post-Conviction Relief, pursuant to Rule 32.2(b).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/23/2004

CR 1992-009620
CR 1992-008576

HON. JOHN FOREMAN

CLERK OF THE COURT
C. Harrington
DEPUTY

FILED: 11/30/2004

GERALD R. GRANT

STATE OF ARIZONA

V.

ANANTI KUMAR TRIPATI

ANANT KUMAR TRIPATI
ADOC NO 102081
PO BOX 3200
BUCKEYE AZ
85326-0000

APPEALS-PCR-CCC
COURT ADMIN CRIMINAL-PCR
VICTIM SERVICES DIV-CA-
CCC
MINUTE ENTRY

The Court has received Defendant's Request for Post Conviction Relief.

The COURT FINDS Anant Kumar Tripati has filed another pro per "Notice of Post Conviction Relief. "This is apparently his eight or ninth attempt to review his convictions and sentences. In it he alleges the same conspiracy of judges that he blames for his convictions, sentences and the failure to grant relief in his prior collateral attacks in the trial and appellate courts. He simply adds to his allegations the names of any judge who rules against him or any of his friends. All of his claims have been considered and rejected before in both the trial and appellate courts. The claims he raises are precluded because they have been rejected before. Rule 32.2, Arizona Rules of Criminal Procedure. Therefore,

IT IS ORDERED dismissing the "Notice of Post Conviction of Relief"

IT IS FURTHERED ORDERED denying the defendant's "Motion to Assign this case to an out of County Judge." There is no legal or factual basis upon which to grant the motion.

IT IS FURTHER ORDERED affirming prior custody orders.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT
A. Burd
Deputy

HON. JONATHAN H. SCHWARTZ

FILED: 10/14/2005
GERALD R GRANT

STATE OF ARIZONA

v.

ANANT KUMAR TRIPATI (A)

ANANT KUMAR TRIPATI
ASPC/LEWIS # 102081
PO BOX 3200
BUCKEYE AZ 85326

COURT ADMIN-
CRIMINAL-PCR
VICTIM SERVICES DIV-CA-
CCC

MINUTE ENTRY

The Court has reviewed the Defendant's Notice And Petition For Post Conviction Relief For Fraud Upon The Court By The Court And For Fraud On The

Court. Defendant has filed at least 10 prior Rule 32 notices and/or petitions. In the instant one, he again alleges that his crimes were manufactured by a conspiracy of judges, prosecutors and investigators. All of these claims have been considered and rejected in both the trial and appellate courts. Defendant is precluded from further relief pursuant to Rule 32.2(a), Arizona Rules of Criminal Procedure.

IT IS THEREFORE ORDERED dismissing Defendant's Notice And Petition For Post Conviction Relief For Fraud Upon The Court By The Court And For Fraud On The Court.

ARIZONA DEPARTMENT OF CORRECTIONS

INMATE LETTER

RESPONSE

Inmate Name: Tripati, Anant, K

ADOC#: 102081

Institution/Unit: Barchey bed 402

From: John ***** Location: Lewis

Date 6-12-02

I have looked into your inmate letter to Mike Torman and offer the following: (a) I have located the CO who destroyed the two boxes seized 12-12-00. He was directed by legal services to destroy these. (b) I have located the CO who worte the 10-29-99 I/R and he tells me he does not know why the I/R was not logged. (c) I verified the contents of the 11-15-99 to Cindy Neese. The memo is inaccurate. Upon the instructions of Judy Gabbert, the documents were destroyed. (d) I spoke to staff who contacted Judges Ronald Reinstein, Jonathon Schwartz, and Gregory Martin and he confirms the truth of the notation in the I/R. (e) I spoke to Robert Tougner about his declaration. He states the fact are not correct and Mike O'Toole Attorney General told him what to say. (f) I spoke to F** Ruiz. He told me

that Kelly Attorney General asked him to submit the affidavit and she knew it was false. (g) found this I/R supplement in your property file which may help you *** *** (signature of doc author?) (end of document)

ARIZONA DEPARTMENT OF CORRECTIONS
Date: April 9, 2001
CONTINUATION SHEET
Report #: [blank]

Page: 2 of 4
instructed me to write this I/R. Last week I received a call from Betty Davis of legal services about I/M Tripati # 102081. She wanted me to say in an affidavit that a I/R was false. I was inable (sic) to say that because very often we write I/R's and do not submit \ *** .

Earlier I received a call from Judy Gabbert who was CO IV in Santa Cruz Unit. She wanted me to remove some documents from the I/M property file. I did.

Today I received a call from Kelly – (602) 542-4951 – attorney general- he wants me to say the property was not lost. I can not as th* ***** **** was lost. Kelly wants me to say 12-12-00 seized property receipt is bogus. I can not say that because everyone does not complete the forms the same way. Kelly wanted me to submit a affidavit showing we do not lose a lot of property. I refused as we lose a lot of property.

When I informed Brian Schneider, legal services and he told me, he would take care of it.

It looks like someone is trying to **** **** records. I have [end of handwritten page]

Barchey Unit

ARIZONA DEPARTMENT OF CORRECTIONS

SEIZED PROPERTY RECEIPT

Institution: ASPC-F Date: 12-12-00 Time: 10 L/C
Suspect/Inmate: Tripati Ht: [blank Wt. [blank]
Hair: [blank] Eyes: [blank]
DOB: [blank] SS#: [blank] Address/ADOC # : 102081
Property Seized: 2 boxes 24 x 18 marked Tripati #102081Boxes destroyed by order of DW as they contain thousands of inmate complaints against staff – property loss access
to court complaints
Inmates unauthorized to have such documents
Seizing officer: Illegible name and badge number
Suspect/Inmate: Inmate in Lewis Complex
[Remainder of form not filled in.}

ARIZONA DEPARTMENT OF CORRECTIONS

INMATE LETTER

PRINT OR TYPE --- NO ATTACHMENT

Name: Anant Kumar Tripati ADC#: 102061 Date: Nov 21, 2003 Unit Barchey/6F1
Subject: Property Issues
To Individual: Warden William Gaspar Location: complex
PLEASE DESCRIBE YOUR PROBLEM OR QUESTION COMPLETELY: Staff at CDU lost my property and I **** grievance L06-163-001 which I won. However, the State did not offer me any compensation for **** lost property because staff wrote the wrong unit. The AG says I was offered compensation. Can you check this please?I understand that every mail and property that comes into ADC is checked for contraband. The AG says that in every shakedown, you people check, by removing covers for contraband. I have been here since 1994 and have never seen this done. Why? Can you please review these documents and tell me whether they are the same documents signed by Mr. Woolsey and Stewert? If I must contact someone else, please tell me who. Thanks.
[response]
"Tripati you were denied compensation in 163-001 because staff wrote the wrong unit. This happens frequently when staff work in other units, but not their assigned units. AG **** was advided of this fact. As the issue is in ****(court?) we can do nothing ***f everyitime (sic) of mail and p*** is inspected for

contraband we do not open appliances and search them contraband during searches ** contraband is found that item is seized and forfeited to the state. My investigation leads me to conclude the document dated April 26, 2002 and notorized April 25th, 2002 in CV2001-*41 is not the same document the Director signed. The documents in CV2002-14710 signed by DW Woolsey on 15th Jan 2003 and Director Stewert on 10-30-02 are not the same documents signed by Susanna C. Pineda. *** ***"

Inmate signature: signed-Anant K Tripati
ANANT KUMAR TRIPAT1 102081
Post Office Box 3200
Buckeye, Arizona 85326

State of Arizona Department of Corrections
Inmate Grievance

Rec'd By: D. Graves Title: COIII Badge: (blank) Date: 8-12-99
Name: Anant Kumar Tripati ADC# 102081 Date 8/11/99
Institution: Perryville (Santa Cruz Unit) Case# B03023099
To: Grievance coordinator
A. Description of Grievance (to be completed by inmate): Page One of Two Pages

As mandated by DO 902 I gave Marla Currier, who is in charge of Inmate Legal Copies, 80 pages of original documents for copying. She has lost my originals. These were: (a) a 3 page affidavit executed on 8/15/94 and notarized on 8/15/94 by Teresa Archuleta that confirmed the contents of an interview she gave on 8/15/94. (b) a 2 page affidavit executed 2/10/99 from an employee [SEE PAGE TWO ATTACHED] (next page)
B. Proposed Resolution: What action would resolve the problem? What have you done to resolve the problem?

I need the documents located. COIII Jack, Lang, bothie (sic) have been unable to locate the documents.
Inmates Signature: S/D Anant Tripati Date: 8/11/99
Date: 8/12/99 Grievance Coordinator's signature: S/D (illegible signature)
C. Action Taken by: Grievance Coordinator
Documentation of Resolution Or Attempts At Resolution: Because of staff movement & reassignments, action on your complaint has become delayed through no fault of yours. Repeated requests from the County Attorney's Office has failed to produce your papers. I recommend reimbursement of $8.00 for

cost of copying.
Staff signature: S/D – COIII (signature illegible)
Badge: (blank) Date: 8/31/99
NOTE: You may appeal the grievance Coordinators decision to the Unit Warden / Deputy Warden/ Administrator by filing a form GF-2 (40000047), within ten calendar days of receipt of this notice.

Arizona Department of Corrections
GF Supplement – Grievances

Inmate name: Anant Kumar Tripati ADC #102081
Case No. B03023099
Institution: Perryville (Santa Cruz Unit) Page two of three pages

|X| GF Supplement

of the State of Arizona Insurance Department confirming the contents of a 12/22/96 (c) a 2 page affidavit executed by a Maricopa County Attorney confirming the facts given by Teresa Archuleta in her affidavit and interview of 8/15/94 (d) a 3/5/99 affidavit executed by a Deputy Maricopa County Court Clark confirming the facts regarding immunity to witnesses, the bail bond forfeiture and the role of Judge Ronald Reinstein in my case. This is two pages. (e) 71 pages of handwritten notes, letters/memos and employee records from personal files of Donald E. Conrad, Dean Chatfield, Gunn McKay and Gerald Grant, including complaints against them. These documents are very essential to my challenging my criminal convictions and I have no other set. I need to have these. Marla Currier has stated in the attached inmate letter response: "you have not received your copies because I have not received an OK from the paralegal, and I can do nothing until I get the OK" I have contacted the paralegal and she states: she was not given the papers and hence cannot authorize the copies. I have also contacted the inmate worker, Richard Gill, and he states he remembers Marl Currier taking my documents to Complex but has not seen the documents come back.

Signed: Anant Tripati S/D Dated 8/11/99

Inmate Grievance/Investigation Report

Name: Anant Kumar Tripati **ADC#** 102081 **Date:** 8/30/99 **Case #** B03045099

Institution: Santa Cruz Transmit To: D. Graves, COIII

A. Describe the events which led to property loss (include dates and times):

On May 14, 1998 I gave M&P a tape with two witness interviews, to be mailed. M&P while packing the tape, packed some other inmate's music tape and sent that out and mailed the tape I gave them to someone else.

B. Identify the inmates or ADC Staff involved in the events described above:

Anant Kumar Tripati, 102081, and M&P Staff

C. Attach to this form a list of the lost property. This list should include: A complete description, the manufacturers name, model number, serial number, condition, receipts for purchase indicating where the item was purchased and the price paid or if receipts are not available, an estimated price. Also include any receipts for any transfers of the property.

D. What actions have you taken so far to resolve this problem?

The tape location by calling Winslow and Santa Cruz M&P was without success.

E. What actions would resolve the problem to your satisfaction?

The tape located.

Inmate signature: Anant Tripati S/D Date: (blank)

Coordinator signature: S/D (signature illegible) Date: 8/31/99

Determination

F. Was loss based on negligence/accident by ADC or

any of its Employees? (X) YES

G. If answer to above is Yes, how was this determined?

Supporting Documention.

H. Remedial action taken to prevent future loss of this type?

Staff exercise care in handling property.

Staff Signature: S/D COIII (signature illegible)

Date: 8/31/99

State of Arizona
Department Of Correction
Inmate Grievance

Rec'd by: D. Graves Title: COIII Badge# (blank) Date: 8/31/99
Name: Anant Kumar Tripati ADC #102081 Date August 30, 99
Institution: Perryville Case No. B03045099
To: Grievance Coordinator Mr. D. Graves COIII
A. Description of Grievance (to be completed by inmate):

On May 4, 1998 I gave a tape interview of two witnesses, Teresa Archuleta and Jane Doe, for mailing to Mr. Dan Sands of the Maricopa County Attorney's Office. Mail & Property, when packing the tape, packed some other inmates music tape and sent that to Mr. Sands and mailed my tape to someone else. CO III A. Doom called and was unable to find the tape.
B. Proposed resolution: (What action would solve the problem? What have you done to resolve the problem?)

Because Mail and Property staff were not careful, they have now lost the tape. If the tape cannot be located, I ask for appropriate reimbursement. CO III A. Doom made a few calls, CIP searched the property room and was unable to find the tape. They state if the wrong tape was mailed out, my tape was lost and I should seek reimbursement.
Inmate signature: S/D Anant Tripati Date: 8/30/99
Date: 8/31/99 Grievance Coordinator's Signature: S/D (signature illegible)
C. Action taken by: Grievance coordinator
Documentation of Resolution or Attempts at resolution: I recommend reimbursement.
Staff Signature: S/D COIII (signature illegible)

Badge: (blank) Date 8/31/99
Note: You may appeal the Grievance Coordinator's decision the Unit Warden/ Deputy Warden/ Administrator by filing a form GF-2 (40000047), within ten calendar days of receipt of this notice.

Inmate Grievence/Investigation Report

Name: Anant Kunar Tripati ADC# 102081 Date 8/12/99 Case #B023099

Instituion: Santa Cruz (B03) Transmit to: COIII Graves

A. Describe the events which led to property loss (include date and times):

I gave Marla Currier the documents described in the grievance –80 pages—and she stated "you have not received your copies because I have not feceived an OK from the paralegal, and I can do nothing until I get the OK". The paralegal states she never received the documents. The 90 pages have been lost by Marla.

(If additional pages are needed use form #40000075 and mark attachment A)

B. Identify the inmates or ADC staff involved in the events above:

Anant Kumar Tripati 102081, Marla Currier Librarian II, Mercedes Hartzog Paralegal.

C. Attach to this form a list of he lost property. This list should include: A complete description, manufacturers name, model number, serial umber, condition, receipts for purchase indicating where the item was purchased and the price paid or if receipts are not available, an estimated price. Also include any receipts for any transfers of the property.

D. What actions have you taken so far to resolve this problem:

I need the 80 pages located. COIII, during investigations contacted the chambers of Judges Roger Kaufman, Christopher Skelly and spoke to the Maricopa County Attorney's Office, and they were unable to assist.

E. What actions would resolve the problem to your

satisfaction?

I need the 80 pages found.

Inmate signature: Anant Tripati S/D Date: 8/12/99

Coordinator signature: (illegible) Date: 8/31/99

DETERMINATION

F. Was loss based on negligence/accident by ADC or any of it's employees? YES

G. If answer to above is Yes, how was this determined?

Supporting documentation.

H. Remedial action taken to prevent future loss of this type?

Staff to exercise caution when handling property of others.

Staff signature: (illegible)S/D Date: 10/31/99

Initial distribution: White, Pink, Gold- Grievance Coordinator, Yellow- inmate

Final Distribution: White Risk Management Pink – inmate Gold – Grievance File

ADC GF-3 Inmate Grievance/Investigation Report

"We have not been able to locate the 80 pages which you gave our librarian for copies. She has either lost or misplaced the 80 pages. It is our suggestion you contact the courts for further assistance in the matter. If there is a cost involved, please advise us, and ADOC will reimburse you."

Arizona Department of Corrections
Inmate Property/Contraband Release

To: inmate name: Anant Kumar Tripati **ADC** #102081 **Date:** May 1, 1998
From: Inventorying staff (no names present on form)
Title: (none present)
Subject: Ptoperty to be disposed of on: (blank space)
This is to inform you that the property listed herein must be disposed of by the date indicated above.
Please complete this form and return to the property officer within five workdays of the date of this memo.
Quanitity: 1
Property description – Be specific, note condition: Tape interview with Teresa Archuleta and Jane Doe by Robert Savage.
Reason: Tape to be copied and returned.

S/D 5/5

To Be Completed By Inmate

[X] Send To (illegible writing)
Name: Dan Sands
Street: 301 West Jefferson #800
City: Phoenix, AZ 85003
Stae: Zip Code:
Inmates signature: S/D Anant Tripati 5/1/98
Officers signature: S/D (signature illegible) Date: 5/4/98

ANANT KUMAR KUMAR TRIPATI 102081
PO BOX 370
BUCKEY, AZ 81326

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ANANT KUMAR TRIPATI,	)	CV 00-1345
	)	PHXROS
Petitioner,	)	RULE 59 MOTION
	)	TO VACATE,
vs.	)	ALTER AND
	)	AMEND THE
TERRY L. STEWART et al	)	JUDGMENT
Respondents.	)	

==========

With all due respect to the bench, it appears that, as resolution of the issues in the petition, would require some prominent Arizona Judicial Officers to be questioned, this Court has decided to take the easy way out, and summarily deny relief, thereby, ensuring that the misconduct by the judicial officers at issue not be brought to light and petitioner sacrificed for these officers. However, petitioner believes this is not the right thing to do. [57]

Petitioner in support of the relief he seeks submits as follows: (see footnote 7 page 14 for standard

[57]Petitioner in no way asserts any form of bias by this court against him and does not wish this court to interpret this document as making such an assertion.

of review)

1. This court reviewed the incorrect decisions of the State Court. It should have reviewed the May 25, 1999 and November 10, 1999 decisions. Yist v Nunnemaker, 501 U.S. 797 (1991)

2. This Court erred in not reviewing the State Court decisions and claims under the hidden motive for rendering a biased judgment provisions of Vasquez Hillery, 474 U.S. 254, 263 (1986)

3. The framework set forth in Alcorta v Texas, 355 U.S. 28 (1957), Mooney v Holohan, 294 U.S. 103, 104 (1935) Napue v Illinois, 360 U.S. 264 (1959) and Pyle v Kansas, 317 U.S. 217 91942) should have been utilized to review the claims and it was error not to?

4. This court misapplied Brady to the claims?

5. Arizona v Youngblood, 488 U.S. 51 (1988) was misinterpreted by the Court?

6. This court misinterpreted the facts when applying Herrera v Collins, 506 U.S. 390 (1993)

7. Though it identified the correct standard, this court misapplied it to the facts?

8. These issues cannot be resolved without discovery and evidentiary hearing.

1. THIS COURT REVIEWED THE INCORRECT DECISIONS OF THE STATE COURT

When the State court reviewed the claims, it entered Exhibits I and J as its decisions and under Benson v Terhune, 304 F3d 874, 880 n 5 (9th Cir 2002) and Yist v Nunnemaker, 501 U.S. 797 (1991) those are the decisions subject to review. As will be shown in the arguments that follow, it was error for this court not to review those, thereby prejudicing petitioner.

2. THIS COURT ERRED IN NOT REVIEWING THE STATE COURT DECISIONS UNDER THE HIDDEN MOTIVE FOR RENDERING A BIASED JUDGMENT PROVISIONS OF VASQUEZ v HILLERY, 474 U.S. 254, 263 (1986)

Exhibit I is the last reasoned State Court decision as to Ground One in this habeas corpus petition. Petitioner states the evidence that "was suppressed" is set forth in Exhibits A and B. Exhibit A reads in relevant part

> "The Superior Court has agreed to remove the original bond papers from the files until after the trial"

(Exhibit A page 18) Likewise, Exhibit B reads in relevant part

> "Was there a California Court Order allowing the arrest, search and seizure? On July 1, 1992, we got an order to take custody of the items, but we already had the items on June 24, 1992.

> There was no order when we seized the items. I know this is an issue in the Rule 32. Judge Schwartz will take care of use, I am sure he will find we had authority, though we did not"

(Exhibit B page 4) That exhibit reads at page 5

> "Was an immunity agreement worked out with Jones and Girdley?
>
> Don, Gunn, Dean and I, contacted the Superior Court and made arrangements for the $140,000 Calderon bond not to be forfeited. Our records show Judge Reinstein agreed to this..."

After the evidence was lost by the State Of Arizona (Exhibits E and F) and the Superior Court received Exhibit C, pages 1920, the Arizona Attorney General prepared and submitted an affidavit marked as Exhibit C, 20 through 31, and at 31 it reads in part

> "On 10-29-99 I received a telephone call from Judge Ron Reinstein from the Superior Court of Arizona...."

Exhibit D shows that Judges Ronald Reinstein, Jonathan Schwartz and Gregory Martin wanted all "documents destroyed" That document was prepared 10-29-99 and November 25, 1999. [58]

Exhibit I shows that on November 10, 1999,

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[58] Only after discovery and a hearing, can the issue be resolved. Whether the Judges did make the statements, whether or not the evidence was destroyed, whether or not the evidence was what EX A and B say, all can only be decided in a hearing.

Judge Gregory

H. Martin denied relief and Arizona Appellate Courts denied review.

One of the three judges who asked that evidence be destroyed decided the issue and as set forth in argument 7 infra, there is no support in this record for his decision.

Likewise, one of the other judges who asked evidence be destroyed was the trial judge.

As here these judges "had some basis for rendering a biased judgment, his actual motivations are hidden from review,...we must presume the process was impaired" Vasquez v Hillery, 474 U.S. 254, 263 (1986) because the due process clause mandates judges not be biased. [59]
In re Murchison, 349 U.S. 133, 136- 139 (1991)

This is a structural defect and not subject to harmless error review Arizona v Fulminante, 499 U.S. 279, 309 (1991)

Based on the foregoing this court should vacate its judgment and decide this issue pursuant to Vasquez, supra.

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[59] It should be noted "though not relevant to the issues directly" Judges of Maricopa County Superior Court have come out recently and stated that in Maricopa County, judges and prosecutors act in concert (EX G). On petitioner's website, comments have been sent by lawyers and others, showing that judges in Maricopa County do act inappropriately (Ex H). So this conduct is embedded in the system.

3. THIS COURT ERRED IN NOT REVIEWING THE CLAIMS PURSUANT TO THE FRAMEWORK IN ALCORTA V TEXAS, 355 U.S. 28 (1957) MOONEY v HOLOHAN, 294 U.S. 103 (1935) NAPUE v ILLINOIS, 360 U.S. 164 (1959) AND PYLE v KANSAS, 317 U.S. 217 (1942)

The evidence that is set forth in Exhibit A page 18, B 3 through 7, K 38 to 40, were NOT DISCLOSED PRETRIAL AND WAS DISCLOSED PURSUANT TO A PUBLIC RECORDS REQUEST.

They reflect "the State manufacturing the crimes by and through manufactured evidence" and see also Exhibits L through N.

In Mooney v Holohan, 294 U.S. 103, 104 (1935) petitioner Mooney alleged that "the sole basis of his conviction was perjured testimony, which was knowingly used by prosecuting authorities in order to obtain that conviction..." He argued that the conscious use by the State of perjured testimony and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process. The Attorney General Of California argued that "it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied." Id at 112.

The Supreme Court rejected this view of due process and stated that due process

> "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction

> through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice....And the action of prosecuting officers on behalf of the state....may constitute state action within the purview of the Fourteenth Amendment."

Id at 112-113.
Seven years later in Pyle v Kansas, 317 U.S. 213 (1942) the court emphasized this theme at 215-216

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of his rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody."

In Alcorta v Texas, 355 U.S. 28 (1957) the Court was confronted who on direct knowingly allowed the witness to present false testimony of disputed relationship with the defendant's murdered wife. The Court held this false impression violated due process Alcorta 355 U.S. at 31.

In Napue v Illinois, 360 U.S. 264 (1959) Chief Justice Warren reinforced this constitutional imperative quoting from a New York Court Of 'Appeals case

> "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth"

Id at 269-270 (quoting People v Savvides 1 N.Y.2d 554,557)

In 1976 the Court revisited this recurring issue, noting that it "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" United States v Agurs, 427 U.S. 97, 103 (1976). The Court observed that the Mooney line of cases applied this strict standard "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." Id

This Court erred when it did not review the claims applying this framework to the suppressed evidence that was destroyed.

Here, if the suppressed evidence is placed in context, it clearly undermines the verdict and the result would have been different. Its suppression was not harmless mandating an evidentiary hearing.

F.THIS COURT MISAPPLIED BRADY TO THE CLAIMS PRESENTED BY PETITIONER

According to this court as petitioner did not demonstrate "there existed some credible evidence of exculpatory value" (Doc 42 pp 6 lines 12-13) and in consideration of the record as a whole there is "overwhelming evidence of Petitioner's guilt" (Doc 42 pp 6-lines 12-13). This is an absolutely incorrect statement of the record.

First of all, the State Of Arizona by and through Exhibits E and F (which are 801(d)(2) statements), admitted that it lost the tape and 80 pages. [60]

Secondly, the tape and 80 pages had evidence set forth in Exhibits A and B;

Thirdly, the evidence that was not disclosed shows the State manufactured the crimes (see argument 3 pages 4 through 7, and arguments 7 and 8).

This evidence was favorable to the petitioner and suppressed United States v Agurs, 473 U.S. 667, 676 (1985) by the State United States v Bagley, 427 U.S. 97, 110 (1976) and it's

Had the evidence not been suppressed, petitioner could have shown the jury the fact that the crimes were manufactured, which he could not, because of the suppression.

In Strickler v Greene, 527 U.S. 263 (1999) the court observed "In Brady v Maryland...this Court held "that the suppression by the prosecution of evidence

[60] The State has never contended that Exhibits C through F are fake. Likewise they have never disputed the facts in Exhibits A and B, which are also supported by Exhibits K through N, in part suppression prejudiced petitioner. Bagley 473 U.S. at 678.

favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment."....We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused...and that the duty encompasses impeachment evidence as well as exculpatory evidence."

As set forth in the second argument (Page 2 through 4), under Vasquez, the decision by Judge Gregory Martin is invalid. Likewise, as set forth in argument three (pages 4 through 7), the suppressed evidence, would have undermined the state's case. As such, discovery should be ordered and an evidentiary hearing ordered (Argument 7 and 8, infra)

The suppression of the evidence was not harmless.

5.

THERE IS NO BAD FAITH REQUIREMENT UNDER ARIZONA V YOUNGBLOOD, 488 U.S. 51 (1988) WHEN BRADY MATERIALS ARE DESTROYED

Finding in page 7 lines 3-6 of document 42 that as petitioner has not shown bad faith, the destruction of evidence claim fails.[61]

Under Youngblood, when Brady materials are destroyed, there is no requirement of bad faith. Justice Rehnquist's opinion of the Court began by noting that the police had not violated Brady or Argus 488 U.S. at 15 and that is why Youngblood imposed a bad faith requirement. However, here there is a Brady and

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[61] The State in Exhibits D through F admits it lost the evidence set forth therein. These are 801(d)(2) statements.

Argus violation as discussed in grounds 3 and 4, supra.

Youngblood at 488 U.S. at 56 states "unlike in Trombetta, the State did not attempt to make any use of the materials in its case in chief" Here, the entire case is derivative of the materials suppressed and destroyed.

The Youngblood court states at 488 U.S. at 57 that bad faith applies when evidence is "potentially exculpatory" Here, the evidence is of "highly probative value" as set forth in arguments 2 to 4. Hence, there is no bad faith mandate.

When evidence is "so critical to the defense as to make a criminal trial fundamentally unfair" 488 U.S. at 61, there is no bad faith requirement. The evidence destroyed falls under this category.

When evidence is "likely or probably" exculpatory, the Youngblood bad faith mandates do not apply United States v Thomas no: 98-50420 199 WL. 17395 @ *3 (9th Cir. 9/24/99)

When evidence is destroyed after trial, Youngblood's bad faith mandates do not apply Fields v U.S. 698 A 2d 485 (DC 1997)

Youngblood only applies to accidental not intentional destruction. [62]

Finally under Mitchell v Goldsmith, 878 F2d 319 (9th Cir. 1989), Youngblood's bad faith mandates do not apply when as in this case, there is an animus.

As these issues can only be resolved after discovery, this court should vacate the dismissal.

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[62]Whether or not the evidence that the State contends it lost (EX D to F) did in fact have Exhibits A and B, can only be resolved after a hearing.

6.

THIS COURT MISINTERPRETED THE FACTS WHEN REVIEWING THE ACTUAL INNOCENCE CLAIMS

This court found that as plaintiff has not shown that the Herrera holding applies to non-capital cases and just because there is overwhelming evidence of guilt in the record, the actual innocence claim fails .(Doc 42 page 9-10)

What this Court disregarded is the fact that the crimes were manufactured by the State (Arguments 2 to 5) and as stated in argument 2, the judicial officers had a hidden motivation to render a biased judgment.

Secondly, Ring v Arizona, 122 S.Ct. 2428 (2002) states that unless the Supreme Court states in plain and clear terms that it's holdings are limited to capital cases, they apply to all cases.

Finally, the Ninth Circuit stated that a habeas petitioner "asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove he is probably innocent." Carringer v Stewart, 132 F3d 463, 476 (9th Cir. 1997)

This petitioner has clearly made this showing in page 12 of his objections.

Hence, this court should vacate this decision and order evidentiary hearing on the claim.

7.

THIS COURT MISAPPLIED THE CLEAR AND CONVINCING STANDARD TO THE FACTS

In page 7 lines 12-14 of document 42, this court states there is nothing in the record that rebuts the

findings. In St Mary's Honor Ct. v Hicks, 509 U.S. 502, 506 (1993) the court stated that when the opposing party produces evidence casting doubt on the truth of the presumed facts, the party is no longer aided by the presumption. This petitioner has satisfied this burden. For example:

The Arizona Attorney General prepared EX C page 29-31. At 31, the affiant states on 10-29-99 Judge Ronald Reinstein called, talked about petitioner's Rule 32 and stated the Rule 32 was dismissed. Judges do not make such calls and this shows there is something wrong with the way things were done.

Likewise, the Rule 32 was denied November 4, 1999--6 days after the call by Judge Reinstein. How was the judge aware that six days later the Rule 32 would be denied.

Likewise there is nothing in this record that supports EX I para 3 to 6.

Here the petitioner produced 801(d)(2) statements Exhibits D, E, F, affidavit by the Attorney General's Office Exhibit C, affidavits and other documents Exhibits K through N, that case doubt on the viability of the findings made by the Arizona State Courts.

Finally, as set forth in argument 2, under Vasquez, the decision by the Arizona Courts should not be given any credence due to their hidden motivations.

8.

THE ISSUES CAN ONLY BE DECIDED AFTER DISCOVERY AND WITH AN EVIDENTIARY HEARING

Federal Judge Harry Claiborne, Walter Nixon, State Judge William Scholl were all people with

excellent reputations, until their convictions in federal courts in Arizona, Nevada and Mississippi. Until their convictions, nobody could say anything about them that were adverse. Their reputations are all that they had.

Here, there are three Arizona Judges involved---Ronald Reinstein--Jonathan Schwartz--Gregory Martin. This court is relying on their reputations in the local community, disregarding the evidence, and finding they did nothing unconstitutional.

However, there are still numerous questions. Why is it that Judge Ronald Reinstein made that call on 10-29-99 as set forth in the affidavit prepared by the Arizona Attorney General (Exhibit C page 31) discuss the pending matter before that court?

How is it that at least 9 days before the Rule 32 was denied (Exhibit I) that Judge Ronald Reinstein was able to tell Judy Gabbert that the Rule 32 was denied?

What happened to the evidence that is a subject matter of Exhibits E and F)?

Why is it that the Attorney General's Office refused to provide a duplicate of the evidence as set forth in Exhibit D Page 14?

All these issues and the issues regarding the conduct of the prosecution can only be resolved by an evidentiary hearing, because the State Courts, for the reasons in page 2 through 4 argument 2, would not let petitioner develop these facts Jones v Wood, 114 F3d 1002, 1009 (9th Cir. 1998)

Unlike the situation in Bracy v Gramley, 520 U.S. 899 (1997), this petitioner has presented sufficient evidence, showing that, he would be entitled to relief. Hence this court should allow discovery (see document 32) and an evidentiary hearing.

CONCLUSION

Few things are more repugnant to the constitutional expectations of our criminal justice system than covert perjury, and especially perjury that flows from a concerted effort by judges and prosecutors, to frame a defendant. The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth in accordance with due process.

Unfortunately, this court, inspite of the wealth of evidence supporting this petitioner, has taken the approach that professional courtesy mandates, the three judges against whom there is a wealth of evidence, be protected. However, petitioner believes he has made a sufficient showing that the Arizona Courts decision is both "contrary to" federal law and also constitutes an "unreasonable application" of federal law Lockyer v Andrade, 123 S.Ct. 1166, 1173 (2002) Bell v Cone,122 S.Ct. 1843, 1850 (2002).

Petitioner asks that the judgment be vacated, discovery previously requested, ordered and the matter be set for an evidentiary hearing.

Respectfully submitted,

S/D_____
ANANT KUMAR TRIPATI

7/When as in this case, the vital information is not developed in the state courts, the state court's findings of facts are not given the presumption of correctness

Dyer v Calderon, 151 F3d 970, 975 (9th Cir. 1998) Vargas v Lambert, 159 F3d 1161, 1168 (9th Cir. 1999). When without any evidentiary hearing the state courts make decisions as to the reliability of evidence, there is no presumption of correctness given to that finding Swan v Peterson, 6 F3d 1373, 1379 (9th Cir. 1993) Ex parte communications between the judges as the Reinstein call and the subsequent communications with judges Schwartz and Reinstein are not given the presumption of correctness Ashford v Gilmore 167 F3d 1130, 1135 (7th Cir. 1999). Brady violations are reviewed de novo Singh v Prunty, 142 F3d 1157, 1161 (9th Cir 1998) When claims are made regarding evidence being manufactured, they are reviewed de novo United States v Wallach, 935 F2d 445, 447 (2nd Cir. 1991) Destruction of evidence claims are reviewed de novo United States v Cooper, 903 F2d 928, 931 (9th Cir 1993) If credibility determinations were made without evidentiary hearings, they are reviewed de novo Anderson v Calderon, 232 F3d 1053, 1054 (9th Cir. 2000) Denial of request for leave to conduct discovery is reviewed for abuse of discretion Brady v Gramley, 520 U.S. 899 (1997) and the inquiry is whether, if discovery was granted, could petitioner present enough evidence to support his theory on habeas.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANANT KUMAR TRIPATI	) NO: CV 00 134
	) PHX ROS
Petitioner,	) (ARIZONA,
	) PHOENIX)
vs.	) APPLICATION
	) PURSUANT TO
TERRY L. STEWART et. Al	) CIRCUIT RULE
	) 22.1(c) FOR
Respondents.	) CERTIFICATE OF
	) APPEALABILITY
	) ON NINE ISSUES
	) ***MOTION FOR
	) THE
	) APPOINTMENT
	) OF COUNSEL.
	) APPLICATION.
	) TO FILE A
	) SECOND HABEAS
	) PURSUANT TO
	) EQUITABLE
	) POWER.

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Pursuant[63] to FRAP 22, Ninth Circuit Rule 22-1 and the Advisory Committee Notes to Circuit Rule 22-1 Petitioner moves this Court to issue a certificate of appealability[64] on these issues which were properly presented to the District Court, for that Court, was in error when it found[65] that petitioner was not entitled to relief and a certificate of appealability (E.R. BB pp 3 lines 14-15) Miller-El v Cockrell, 123 S.Ct. 1029 (2003)

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***Judge Barry Silverman is disqualified as he presided on issues in this case as a Magistrate Judge.
Before this court is a motion to dismiss a premature request for COA (E.R. AA and BB)

64 2/Recently petitioner became privy that Judge Silver has personal relationship with individuals whose misconduct is at issue in this habeas (E.R. CC. •pp 15-1.7, infra)

65 For example,(E.R. S, R, H) the crimes were manufactured and under Arizona Law, once the jury returned a .guilty verdict, claims of actual innocence, are not subject to executive clemency until after the sentence is served, which is December 24th, 2044, 52.5 years in this case (E.R. Of pp 26-27) The evidence favorable to the petitioner which would have changed the verdict was concealed; and after trial destroyed (pp 18-25) with the judges, referred to in FN 2 asking that all records be destroyed (E.R.M and L) and after this request for destruction, these same judges decided the claims and Arizona Appellate and Supreme Courts issued post card denials.

This court has the authority to issue a certificate of appealability and the standard to be applied is the same standard that is applied to certificates of probable cause Lowell v Prunty 87 F3d 1358, 1359 (9th Cir. 1996) citing Lennox v Evans, 87 F3d, 431, 434 (10th Cir 1996). When an "applicant has made ·a substantial showing of the denial of a constitutional right" a COA should issue Lynch v Blodgett, 999 F2d 401, 403 (9th Cir 1993) (quoting Barefoot v Estelle, 463 U.S. 880, 893 (1983) (a court is authorized to issue a COA "when a habeas petitioner has made a 'substantial showing of the denial of a federal right.'")

"In requiring a question of some substance, or a substantial showing of the denial of [a] federal right, obviously a petitioner need not show that he should prevail on the merits. He has already failed in that endavor." Barefoot, 463 U.S. at 893 n 4 (internal quotations omitted) To satisfy the "substantial showing" standard, Pennix only "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner]; or that the questions are adequate to deserve encouragement to proceed further," Id (citations omitted) see also United States v Cruz-Mendoza, 147 F3d at 1074 Greenwalt v Stewart, 105 F3d 1268, 1272-73 (9th Cir 1997) Nevius v Sumner 105 F3d 453, 458 (9th Cir 1996) Sechrest v Ignacio, 943 P.Supp 1253, 1257 (D.NEV 1996), citing Barefoot, 463 U.S. at 893 & FN 4. The AEDPA's "substantial showing" requirement is relatily low Jennings v Woodford, 290 F3d 1006, 1010 (9th Cir 2002) and any doubt about granting a COA is resolved in favor of the petitioner. Id

MOTION TO APPOINT COUNSEL

> "It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicate trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation."

Bounds v Smith, 430 U.S. 817, 826 (1977) The Ninth' Circuit stated in Gilmore v California, 220 F.3d 987, 993 (9th Cir. 2000)

> "The wording of the statute and the wishes of scholars notwithstanding, this Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner...should know which facts are legally sufficient, and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one."

Magistrate Judge Moskowitz stated in United States v Janis, 820 F.Supp. 512, .514 (S.D.CA 1992) that when denial of access to courts claims relate to the "right to adequately" represent oneself/ the issue is proper in a federal habeas.

The Respondents do not provide access to a law library and they forbid their paralegals from conducting legal research for inmates (See EX Z, Policy

On Inmate Access) ***[66] In order to have a certificate of appealability issued, petitioner must show "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that vo. the questions are adequate to deserve encouragement to proceed further" Barefoot, supra Cruz-Mendoza, supra, Greenwalt, supra.

To meet this showing, petitioner must provide this court with relevant points and authorities. This cannot be done because of the policy implemented by respondents that forbid their paralegals from assisting inmates (Ex z)

However, petitioner has utilized whatever limited resources he has had access to and the case law he could lay his hands on, in order to apply for a certificate of appealability and to satisfy the burden imposed by statute.

In light of the foregoing, this court should appoint counsel. "The tools Pounds] requires to be provided are those that the inmate needs in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement" Lewis v Casey, 518 U.S. 343, 355, (1996)

As petitioner has not made the choice to represent himself, but is compelled to represent himself, in light of 'the Bounds obligations imposed

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66***Because of the lack of a law library and due to the prohibition in Respondents policies on their paralegals conducting legal research, petitioner had to narrow his habeas to the issues raised in this habeas. However, had he access to the legal materials or had there been no prohibition/ he could have researched the viability of raising the other issues on federal habeas see issue 9, infra.

upon the Respondents, this court should either appoint counsel, or direct the Respondents to research the issues, provide petitioner with the necessary case law that aids his position as to the nine issues.

THE ISSUES ON WHICH THE COURT SHOULD ISSUE CERTIFICATE OF APPEALABILITY

1. When an affidavit prepared and submitted by the Arizona Attorney General showed that prior to deciding the petition a Judge Ronald Reinstein called a Judy Gabbert and had discussions regarding the petition and told her that the petition, which was still pending, was dismissed, and when other 801(d)(2) statements produced showed that Judge Ronald Reinstein, Judge Jonathan Schwartz and Judge Gregory Martin had asked that evidence be destroyed, should the District Court have reviewed the decision in accordance with the hidden motivations of rendering a biased judgment provisions of Vasquez v Hillery, 474 U.S. 254, 263 (1986) Is the decision of the Arizona Courts "contrary to" as well as an "unreasonable application of" Vasquez v Hillery, 474 U.S. 254, 263 (1986)AND an unreasonable determination of facts. Page 15. to 17

* * *

2. As the destroyed evidence showed the state prosecutors manufactured the crimes by intentionally using false evidence, should the district court have reviewed the claims in compliance with the framework in Alcorta v Texas, 355 U.S. 28 (1957) Mooney v Holohan,

294 U.S. 1631.1935) Napue v Illinois, 360 U.S. 264 (1957) and Pyle v Kansas/ 317 U.S. 217 (1942) Is the decision of the Arizona Courts "contrary to" as well as an "unreasonable application of" Alcorta, Mooney, Napue and Pyle, supra were the facts unreasonably determined by state courts? Page 18-20

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3. When the destroyed evidence was "disclosed after trial" and "would have shown the State manufactured the crimes" should the district court have found a violation of Brady v Maryland, 373 U.S. 83 (1963) Is the decision of the Arizona Courts "contrary to" as well as "an unreasonable application of" Brady and it's protege? Were the facts unreasonably determined? Page 21 to 23

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4. Does the bad faith requirements of Arizona v Youngblood, 488 U.S. 51 (1988) apply to Brady materials destroyed after trial? Is the decision of the Arizona Courts "contrary to," and an "unreasonable application of" Youngblood? Were facts unreasonably determined?
Page 24 to 25

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5. As evidence showed petitioner is "factually innocent" and Arizona Courts have declined to provide review by any means of "actual innocence" until "after the prison term is completely served" did Herrera v Collins, 506 U.S 390 (1993) mandate habeas relief? Is the decision of the Arizona Courts "contrary to" or an "unreasonable application of Herrera? Were facts

unreasonably determined?
Page 26 to 27

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6 Did the District Court err in giving the presumption of correctness to the Arizona Courts findings inspite of the clear and convincing showing that they were clerly erroneous? Page 28 to 30

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7. Did the decision of the district court to deny discovery conflict with Bracy v Gramley, 520 U.S. 89.9 (1977)? Page 31

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8. Did the district court err in denying an evidentiary hearing? Page 32

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9. As Respondents violated their Bounds obligations, does equity mandate petitioner be allowed to file a second habeas? Page 32 to 37.

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STANDARD OF APPELLATE REVIEW FOR THESE ISSUES

An order denying habeas relief is reviewed de novo Benn v. Lambert, 283 F3d 1040, 1051 (9th Cir. 2002). The courts "look through" the unexplained decisions of the Arizona Appellate and Supreme Courts to the last reasoned decision "as the basis for the state court's judgment" Shackleford v Hubbard, 234 F3d 1074, 1079 n 2 (9th Cir. 2000) Benson v Terhune, 304 F3d 874, 880 n 5 (9th Cir. 2002). Postcard denials are subject to independent review Delgado v Lewis, 223 F3d 976/ 982 (9th ' Cir.2000)

Whether or not the state .court erred under AEDPA it reviewed pursuant to the two step process in Anthony v Cambra, 236 F3d 568 (9th Cir. 2000). First, the court determines whether there was error and second the remedy.

Credibility findings made by the District Court is given considerable deference only if there has been an evidentiary hearing Anderson v Calderon, 232 F3d 1053, 1054 (9th Cir. 2000)

Factual findings made by the District Court is reviewed for clear error Zichko v Idaho, 247 F3d 1015, 1019 (9th Cir. 2001)

Findings of facts are reviewed for a demonstrated lack of fair support in the record Marshall v Longberger, 459 U.S. 422, 432 (1983)

Denial of the opportunity to conduct discovery is reviewed for an abuse of discretion Bracey v Grgaley, 520 U.S. 899 (1997)

When the state declines to afford petitioner the chance to develop the facts and if development of those facts will afford petitioner habeas relief, an evidentiary hearing must be afforded and denial is reviewed de novo Jeffries v Wood, 114 F3d 1002, 1009 (9th Cir 1998)

Mixed questions of law and fact are reviewed de novo Dubria v Smith, 224 F3d 995, 1000 (9th Cir 2000) (en banc),

The presumption of correctness is not afforded the state court findings of facts if vital facts were not allowed by the state court to be developed Dyer v Calderon, 151 F3d 970, 975 (9th Cir. 1998) Vargas v Lambert, 159 F3d 1161, 1168 (9th Cir. 1993) When without an evidentiary hearing state courts make

decisions regarding the reliability of evidence, they are not afforded the presumption of correctness Swan v Peterson, 6 F3d 1373, 1379 (9th Cir. 1993).

Findings regarding ex parte communications by judges are not given the presumption of correctness and reviewed de novo Ashford v Gilmore, 167 F3d 1130, 1135 (7th Cir 1999)

Brady issues are reviewed de novo Singh v Prunty, 142 F3d 1157, 1161 (9th Cir. 1998)

Whether or not evidence has been manufactured is reviewed de novo United States v Wallach, 935 F2d 445, 447 (2nd Cir 2992)

Destruction of evidence claims are reviewed de novo United States v Cooper 903 F2d 928, 931 (9th Cir 1993)

STATEMENT OF FACTS TEAT ARE RELEVANT TO THE CLAIMS

After petitioner was convicted he received through a public records requests documents that proved what he has asserted since his arrest, that the crimes were manufactured and that three judges were involved in the creation of the crimes.

However, State authorities lost/destroyed the documents and a tape with two witness interviews (See E.R. I and J) [67]

Acording to Teresa Archuleta of the Maricopa County Attorney's Office

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[67] Unless otherwise stated the documents are appended to the objection to R&R (CR #39, 40) and Traverse (CR* 14)

"The Superior Court has agreed to remove the original bond papers from the files until after the trial. I checked with the forfeiture .section and they say they will not do anything in regards to the forfeiture of the four bail bonds, as long as Mr. Girdley and Mrs. Jones testify. The Clerk's office has agreed 4J...not to send any papers in this regards.

According to the Insurance Department, Mrs. Jones was authorized to post bonds, not to exceed $10,000 under her license. They say she violated state insurance laws by using her license to post the bail bonds for BONDCO. As requested by Judge Ronald Reinstein, Gunn and yourself, they have agreed not to do anything to Mrs. Jones and Mr. Girdley, as they will testify against Tripati. They have agreed to send someone, not familiar with licensing procedures, to testify as a witness.

Mr. Frank Cotter called today regarding testifying for Tripati. I reminded him if he were to testify that Tripati did not ask him to inflate the appraisals he shall be prosecuted. I told him he should not come and testify as a witness.

I reminded Mrs. Jones not to testify to the version of the-facts she gave Tide. Florez on the 13th of June. She knows if she-were to give the version she gave Vida Florez, she will have to pay the $140,000 and will be prosecuted. She understands this.

John Naughton's affidavit arrived today with the $4,000,000 receipt issued by Mr. Girdley. As instructed these are not in the Tripati file.

The 85 insurance companies contend Girdley defrauded them and they believe Girdley did the same in this case. There may be a 404/406 issue. These documents are not in the file. They are at home."

(E.R. G at 18)[68] These facts nor the contents of the memo or memo were disclosed by the prosecutor.

In a separate interview, Teresa Archuleta stated

"Q. Why is it that the county arrested him?

A. He was creating a lof of waves and I told him so. Had he listened to me, he would not have been arrested

Q. Why were these documents very important?

A. They were handwritten notes and other documents our office created which showed various practices in Maricopa County. With the documents, there would' have been chaos. Many of the criminal convictions would have been vacated, had the documents been released. The documents show our true color.

Q. What about the real estate appraisals and the real estate?

---

[68] E.R # refers to the Excerpt of record appended to this application

A. Dean, Don and I had extensive discussions with Gunn on the matter. Don Plainly advised Frank Cotter, one of the appraisers that if he were to testify that Mr. Tripati did not ask him to inflate the values, he would be prosecuted. I talked to him and he has repeatedly stated Mr.'Tripati did not ask him to inflate the values. Before the arrest, I had discussions with Mr. Tripati about the appraisals. he told me, he was no real estate guy, but if we wanted our own appraiser to appraise the property, he would pay for it. Based" on my discussions with him, I know he did not ask for inflated values and did not know the values were wrong.

Q. Are you saying Mr. Frank Cotter was told by Don Conrad not to testify?

A. Correct. Don told him in very simple terms that if he was to testify, he would charge him. I believe he should have been allowed to testify.

Q. What about Robert Means?

A. What Mr. Means did not tell the jury, was the fact that Mr. Tripati had no way of knowing the real estate was not worth as appraised. Don, Gunn, Dean, and I deliberately used Mr. Means, because it was our intention to mislead the jury into •slieving otherwise. Mr. Tripati has correctly stated in his Rule 32 that a real estate expert should have been used, as the expert testimony would have changed the verdict. Mr. Madan and Mr. Dhillon correctly stated Mr. Tripati did not know about the value of the property. I know for certain he did not, and base this on our discussions,

when the property was being used.

Q. What about the documents used to post the bonds?

A. They are exactly the same as what Jones has used all these years. The type prints on them match those filed in court before. They were not given or created by Mr. Tripati, we did examine the documents created by Mrs. Jones and Mr. Girdley and the documents used to post the bonds, match the examined documents.

Q. Did you talk to Mrs. Jones?

A. Mrs. Jones posted the bonds before she talked to Mr. Tripati. She did state in very clear terms that Mr. Tripati did not ask her to do anything but, when he found out, he stopped her loss. Before her testimony, Don talked to her. When she advised Don as to what she was going to testify to/ Don told her, he would arrest and prosecute her, take away her license and have the State Department Of Insurance act against her. He also told her, she would have to pay the $140,000. She changed her testimony, to save paying the money.

Q. Was an-immunity agreement worked out with Jones and Girdley?

A. Don, Gunn, Dean and I, contacted the Superior Court and arranged for the $140,000 Calderon bond not to be forfeited. Our records show Judge Reinstein agreed to this. We also talked to the Insurance Department and asked them not to take any administrative or civil actions against Jones and

Girdley. Don contacted the Insurance Department and asked them not to present witnesses who could testify to the fact that BONDCO violated state insurance laws and Jones could not do what she did. We also told Jones and Girdley they will not be prosecuted. All this had to be done, to make certain, Jones and Girdley testified. I think you can say there was an informal agreement.

Q. If the court were to order production of all notes, what will they show?

A. Notes prepared by Don, Gunn, Dean, gerry, myself, Vince, Ron all show Don, Gunn, Dean and I manufactured the case. With these notes, one thing is for certain, there 'will be no convictions. They are Brady materials."

E.R. H at 3 to 5) The contents of the interview and the matters in the interview, were not disclosed during the trial.

The Arizona Attorney General submitted an affidavit in which it was disclosed that before the petition for po4•conViction relief was decided by the Maricopa County Superior Court, the Presiding Judge Of The Criminal Division, Judge Ronald Reinstein contacted a Judy Gabbert and advised her that the petition based on the evidence was denied (However, it was pending and not decided) (E.R. L at 31) An additional report that was generated by the State, showed that during their follow up call, State authorities talked to Judges Jonathan H Schwartz, Gregory H Martin and Ronald Reinstein and all the

three asked that evidence regarding the destruction/loss of the evidence be destroyed (E.R. M) and this was done.

Judge Gregory H Martin who was one of the judges that asked for the destruction of the evidence (E.R. M) denied relief summarily and made ex parté findings, none of which has any support in the record (E.R.N) and both the Arizona Court Of Appeals as well as the Arizona Supreme Court issued postcard denials, refusing to review the decision (E.R. N)

As the evidence suppressed and later destroyed combined with E.R. R through X do clearly show the State did in fact create the crimes and petitioner is "actually innocent," petitioner asked both the Governor of Arizona and the State Courts to
grant him relief for "actual innocence," He was denied access to the process and told that as a jury found him guilty, his claims of actual innocence cannot be reviewed under Arizona law. (E.R. 0)

THE STATUTORY CRITERIA FOR HABEAS RELIEF

According to the AEDPA, this Court must determine whether the Arizona Supreme Court's adjudication of these claims either (1) "resulted in a decision that was contrary to, or involved an, unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. 2254(d)91) • & (2). "Clearly established" federal law refers to "the governing legal-- principle or principles set forth by the Supreme Court at the time the state court renders it's decision" Lockyer v

Andrade, 123 S.Ct. 1166, 1172 (2003). "While Supreme Court precedent is the only authority that is controlling under AEDPA, we look to the Ninth Circuit case law as 'persuasive authority for the purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law'" Davis v Woodford, 333 F3d 982, 990-91 (9th Cir 2003),

The "contrary to" prong which is also at issue here means that a state court (1) arrives at a conclusion on a question of law opposite to that reached by the Supreme Court or(2) when confronted with materially indistinguishable facts from a Supreme Court precedent arrives at a opposite result. Williams v Taylor, .529 U.S. 362, 405 (2000)

The "unreasonable application" prong "permits a federal habeas corpus court to 'grant the writ if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts' of petitioner's case" Wiggins v Smith, 123 S.Ct. 2527,. 2534-35 (2003) "In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to a set of facts different from those of the case in which the Principle was announced'" Id at 2535.
"Unreasonable application" means that the state court's application of clearly established Supreme Court precedent was "objectively unreasonable" Id.

Because in this case the Arizona Supreme Court denied review without comment, this court has to "look through" the unexplained Supreme Court decisions set forth as E.R. N and 0. As in here there is no question as to exhaustion, the last State Court explained decisions are set forth at E.R. N and 0

It is imperative that a .federal habeas court take

note that

> "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition' preclude relief. A federal court can disagree with a state court's credibility determination and/ when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence"

Miller-Et, supra 123 S.CT at 1-041.

> "AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not requiie us to turn a blind eye"

Hall v Dir Of Corr, 343 F3d 976, 984 n 8 (9th Cir 2003)

In this case the District Court "abdicated judicial review and also turned a blind eye to essential evidence".

THE PROCEEDINGS IN THE DISTRICT COURT

Petitioner filed a petition for a writ of habeas corpus and asked for discovery (EX A) The Magistrate Judge directed the request be denied (EX B) and the District Court upheld the denial (EX C). The Magistrate Judge recommended the petition for a writ

of habeas corpus be denied (EX D). Petitioner filed his objections to the R&R (EX E) which was upheld by the District Court (EX F). Petitioner filed a motion to alter and/or amend the judgment (EX Y) which was denied by the District Court (EX AA).

FIRST GROUND FOR ISSUING THE CERTIFICATE OF APPEALABILITY

AS THE ARIZONA ATTORNEY GENERAL HAD SUBMITTED AN AFFIDAVIT SHOWING THAT JUDGE RONALD REINSTEIN MADE PHONE CALLS ABOUT THE NEWLY DISCOVERED EVIDENCE, AND AS OTHER 801(d)(2) STATEMENTS SHOWED THAT UPON THE REQUEST OF THE JUDGES THE EVIDENCE WAS DESTROYED, THE HIDDEN MOTIVATIONS FOR ENTERING A BIASED JUDGEMENT PROVISIONS OF VASQUEZ V HILLERY, 474• U.S. 254, 263 (•986) SHOULD HAVE BEEN THE STANDARD OF REVIEW OF THE CLAIMS/ ESPECIALLY WHEN THE JUDGE WHO DECIDED THE MATTER WAS ONE OF THOSE WHO ASKED FOR THE DESTRUCTION OF EVIDENCE AND THE DECISION WAS MADE WITHOUT ANY HEARING

According to the Arizona Attorney General, a Judge Ronald Reinstein made a phone call to a Judy Gabbert about the lost evidence (EX L) and subsequent reports generated by the State Of Arizona show that Judge Ronald Reinstein, Jonathan Schwartz and Gregory Martin asked that the evidence be destroyed (EX M).

Judge Gregory E. Martin dismissed the petition, without any hearing (EX N).

As set forth in E.R. Y at page 2 through 4 E.R. E page 7 to 8 the judge had "some basis for rendering a biased judgment, his actual motivations are hidden from review" Vasquez v Hillery, 474 U.S. 254, 263 (1986) and this violates due process.

THE GOVERNING SUPREME COURT PRECEDENT

Vasquez v Hillery 474 U.S. 254, 263 (1986) is the governing Supreme Court precedent applicable to this claim.

THE APPLICATION OF THE PRECEDENT

Arizona Courts neither identified nor applied this precedent to the claims.

THE EVIDENCE PRESENTED TO THE ARIZONA COURTS

Arizona Courts were presented with the following evidence:

E.R. G/ I through M. E.R. L is an affidavit prepared by the Arizona Attorney General showing Judge Ronald Reinstein made a phone call. M.R. M is an internal report, a 801(d)(2) Statement showing that Judge Gregory Martin, Judge Ronald Reinstein and Jonathan Schwartz asked for evidence to be destroyed and the other documents show the roles played by these judges in this matter.

THE ACTION BY ARIZONA COURTS

One of the Judges who asked that the evidence be destroyed, Judge Gregory Martin (E.R. M) made the final decision in this matter and summarily denied relief. He entered ER. N and nothing in his findings have any support in the record. He made decisions without any hearing.

The Arizona Court Of Appeals and Supreme Court entered post card denials (E.R. N)

ARIZONA COURTS DID NOT GIVE EVIDENTIARY HEARING

In this case, Arizona Court's did not give any evidentiary hearing on this claim and did not allow petitioner to develop this claim.

The state court findings are not supported by the record in this case, hence the court should not have found it correct Bean v Calderon, 163 F3d 1073, 1087 & n 3 (9th Cir 1998)

As petitioner diligently sought to develop the factual basis for this claim, but was precluded by the State courts from doing so, the provisions of AEDPA mandates an evidentiary hearing Baja v Ducharme, 187 F3d 1075, 1079. (9th Cir 1999)

As in this case the State courts made decisions regarding the reliability of evidence without a hearing, they should not have been presumed to be correct Swan, supra 6 F3d at 1379

APPLICATION OF HARMLESS ERROR

As Judge Gregory H. Martin was one of those judges who asked for the destruction of evidence, the issue is not subject to harmless error Arizona v Fulminante, 499 U.S. 279, 310-11(1991) Chapman v

California 386 U.S. 18, 23 n 8 (1967)

REASONABLE JURISTS MAY DIFFER

Reasonable jurists may differ on this issue and this issue may be resolved in petitioner's favor by reasonable jurists. Hence, this court should issue the certificate of appealability Greenwalt, supra.

SECOND GROUND FOR ISSUING THE CERTIFICATE OF APPEALABILITY

THE PROPER STANDARD FOR REVIEW OF THE CLAIMS IS THE
ALCORTA V TEXAS, 355 U.S. 28 (1957)
MOONEY V HOLOHAN, 294 U.S. 103 (1935)
NAPUE V ILLINOIS, 360 U.S. 164 (1959)
AND PYLE V KANSAS, 317 U.S. 217 (1942)
STANDARDS

The Governing Supreme Court Precedent

Alcorta v Texas, 355 U.S.' 28 (1957) Mooney v Holohan, 294 U.S. 203 (1935) Napue v Illinois 360 U.S. 164 (1959) Pyle v Kansas 317 U.S. 217 (1942) are the precedents that govern the claims at issue.

The Application of the Precedent

Arizona courts neither identified nor applied these precedents.

The Evidence Presented to the Arizona Courts

The evidence presented to the Arizona Courts is

set forth in E.R. E and Y. As set forth in E.R. G, E, and R through Y, the prosecution manufactured the crimes and used false and fabricated evidence to obtain the convictions. In E.R. I to M, the State Of Arizona determined that this evidence was subsequently lost by the State.

The Action by The Arizona Courts

Arizona Courts summarily denied relief (E.R. N) and the person who denied relief is one of the judges who asked the records be destroyed (E.R. M) Nothing in this record supports the findings made by the court in E.R. N.

Arizona Courts Did Not Give Evidentiary Hearing

No evidentiary hearing was given by Arizona Courts in this matter and there is no support for the findings in this record which means the court should not have presumed they were correct. Dean, supra 163 F3d at 1087 & n 3. They refused an evidentiary hearing inspite of requests, hence such a hearing should have been ordered Baja supra 187 f3d at 1079. Arizona Courts findings were made without any evidentiary hearing, hence under Swan, supra 6 F3d at 1379, they should not have been presumed to be correct.

Application of Harmless Error

The decision on direct appeal is set forth at E.R. Q. This error is constitutional error and as it is clear that it had "substantial and injurious effect or influence" on the verdict Brecht v Abrahamson 507 U.S. 619, 623

(1993) because had the jury known the facts set forth in the evidence not disclosed, it would not have found petitioner guilty. O'Neal v McAninch, 513 U.s. 432, 435 (1995) states when there is "grave doubt" as to the harmlessness of the error, habeas relief is proper. O'Neal states at 436 "we note that we deliberately phrase the issue in this case in terms of a judge's grave doubt, instead in terms of 'burden of proof'" Because the harmless error analysis is a purely legal question that lies outside the realm of fact finding .we dispense with burdens of proof and presumptions. Id at 437 (explaining that the court must determine whether the error affected the judgment "without the benefit of such aids as presumptions or allocated burdens of proof that expedite fact finding at trial") O'Neal directs the court to ask a "conceptually clearer" question, in reviewing the record in a habeas case: "Do I, the judge, think that the error substantially influenced the jury's decision?" Id at 436

In the course of this inquiry, it is the State that bears the "risk of doubt" O'Neal 513 U.S. at 438 Valerio v Crawford 306 F3d 742,, 762 (9th Cir 2002)(en banc) This court looks at the State to instill in this court a "fair assurance" that there was no effect on the verdict Morales v Woodford 336 F3d 1136, 1148 (9th Cir 2003)("The state must provide us with a 'fair assurance' that the error was harmless under Brecht") Only if the State meets this burden, can this court find the error was not harmless

In this record, the State has not shown this court that this error did not prejudice the trial.

Hence, it is not harmless

Reasonable Jurists May Differ

As reasonably jurists may differ and as another judge may decide this claim in petitioner's favor, the certificate of appealability should be issued Sassouian v Roe, 230 F3d 1097 (9th Cir 2000) As set forth in E.R..Y at page 4 to 7, the use of the false evidence is what caused the convictions.

THIRD GROUND FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

AS THE DESTROYED EVIDENCE WAS DISCLOSED AFTER TRIAL, DISCLOSED AFTER TRIAL AND WOULD HAVE SHOWN THE STATE OF ARIZONA MANUFACTURED THE CRIMES, THE DISTRICT COURT SEOULD HAVE FOUND A VIOLATION OF BRADY V MARYLAND 373 U.S. 83 (1963)

The State Of Arizona admitted by and through 801(d)(2) statements that it had lost the tape and 80 pages (E.R. Y at 7-8) (see also E.R. E)

The evidence that was not disclosed had evidence set forth in E.R. Ell G, H, and R through X. This evidence was favorable to the petitioner and suppressed and this was`- prejudicial to the petitioner. United States v Agurs, 473 U.S. 667, 676 (1985) United States v Bagley 427 U.S. 97, 110 {1976) (E.R. Y pp 7-8). In the event the evidence would have been disclosed, petitioner could—have shown the jury that the crimes had actually been manufactured, a showing. he could not make because of the suppression (E.R Y p 7-8)

As set forth in Strickler v. Greene 527 U.S. 263 (1999) "the suppression by the prosecution of evidence favorable to the accused...violates due process where

the evidence is material either to guilt or to punishment....even though there has been no request by the accused...and that the duty encompasses impeachment evidence as well as exculpatory evidence."

THE GOVERNING SUPREME COURT PRECEDENT

Brady v Maryland 373 U.S. 83 (1963) and its' protege govern this claim.

APPLICATION OF THE PRECEDENT

Arizona Courts did not apply this precedent and the District Court found that there was no credible evidence of a Brady violation.

THE EVIDENCE PRESENTED TO THE ARIZONA COURTS

Arizona Courts were presented with the evidence set forth in E.R. Y at 7-8, E.R. E as well as E.R. G, H, R through X

THE ACTION BY THE ARIZONA COURTS

Arizona Courts summarily denied relief (E.g. N) and this decision was made by the same judge who asked that evidence be destroyed (E.R.M) Nothing in this record supports the findings made in E.R.N

ARIZONA COURTS DID NOT GIVE EVIDENTIARY HEARING

As Arizona Courts gave no evidentiary hearing and as the findings made by the Arizona Courts find no support in this record, they should not have been presumed to be correct Dean, supra 163 F3d at 1087 & n 3. They refused an evidentiary hearing though petitioner asked for the hearing, hence the hearing should have been given by the District Court under Baja, supra 187 F3d at 1079. In light of the fact they made the finding without an evidentiary hearing, they should not have been presumed to be correct Swan 6 F3d at 1379.

APPLICATION OF HARMLESS ERROR

When the withheld evidence referred to in this claim, is viewed with the evidence presented during .the trial as.:-referred to in E.R. Q, there can be no criminal conviction in this case, (See E.R. Y at page 7-8) and applying the harmless error analysis set forth in page 19-20, supra, this was not harmless under any set of facts.

REASONABLE JURISTS MAY DIFFER

A certificate of appealability should issue because reasonable jurists `may resolve this •issue in favor Of this petitioner Jennings v Woodford 290 F3d 1006, 1010 (9th Cir 2002)

FOURTH GROUND FOR A CERTIFICATE OF APPEALABILITY

THE DISTRICT COURT WAS IN ERROR IN FINDING TEAT THE BAD FAITH REQUIREMENTS OF ARIZONA YOUNGBLOOD 488 U.S. 51 (1988) APPLIES TO DESTRUCTION OF BRJDY MATERIALS AFTER TRIAL

Chief Justice Rehnquist stated in Youngblood that as Brady and Argus 488 U.S. at 15 provisions had not been violated in Youngblood, the court imposed a bad faith requirement for evidence destroyed. In this case[69], unlike Youngblood, there is a Brady-Argus violation, and hence the district court was in error in requiring petitioner demonstrate bad faith. (E43.Y pp 8-9) In Youngblood "the state did not attempt to make any use of the materials in it's case in chief" Youngblood 488 U.S. at 56. However, here the entire case presented by the State is made up of evidence, derivative of the materials suppressed and later destroyed by the State. (E.R. Y pp 9)

The Youngblood court states that bad faith applies only when the evidence is "potentially exculpatory" but in the instant case, the evidence withheld and destroyed is of "highly probative value", negating the bad faith requirements.

Youngblood's bad faith only applies when evidence is not "so critical to the defense as to make a criminal trial fundamentally unfair" 488 U.S. at 61. However, here the withheld and later destroyed evidence is such that without that evidence the trial was unfair (E.R. Y at 9).

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[69] Arizona Courts refused to identify or apply Youngblood and refused to analyze the claim under Youngblood. They did not analyze the claims under good or for that matter bad faith standards.

In United States v Thomas NO 98-50420 1999 WL 17395 * 3 (9th Cir 9/24/99) the court stated when evidence is "likely or probably" exculpatory, the Youngblood bad faith does not apply and as in this case the evidence is "likely or probably" exculpatory, the bad faith mandates do not apply (.E.R. Y at 9) The court in Fields v U.S. 698 A 2d 485 (D.C. 1997) stated that when evidence is destroyed after trial, the Youngblood bad faith', does not apply. In this case the evidence was destroyed after trial hence bad faith is not applicable (E.R. Y at 9)

In this case as the evidence was intentionally and not accidentally destroyed, bad faith provisions of Youngblood is not applicable (E.R. Y at 9) and finally here there is an animus between the prosecution and defendant', hence under Mitchell v Goldsmith 878 F2d 319 (9th Cir 1989) the bad faith provisions did not apply. [70]

As reasonable jurists may differ as to the position taken by the District Court and may reverse the decision; the certificate of appealability should issue Lowell v Prunty, 91 P3d 1358, 1359 (9th Cir 1996) For the reasons in page 19-20, supra, this was not harmless.

FIFTH GROUND FOR ISSUANCE OF THE CERTIFICATE OF APPEALABILITY

THE PROPER STANDARD OF REVIEW FOR

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[70] Arizona Courts refused to identify or apply Youngblood and refused to analyze the claim under Youngblood. They did not analyze the claims under good or for that matter bad faith standards.

ACTUAL INNOCENCE MAIMS IS HERRERA V COLLINS, 506 U.S. 390 (1993) AND THE ARIZONA COURTS FAILED TO APPLY THE PROPER STANDARDS

THE PRECEDENT

The proper precedent for review of this claim is Herrera v Collins, 506 U.S. 390 (1993).

APPLICATION OF THE PRECEDENT

Arizona Courts refused to apply-the precedent. The District Court stated that Herrera did not apply in non-capital cases further stating that as the record has overwhelming evidence of guilt, the claim fails. (E.R. Y pp 10).

THE EVIDENCE PRESENTED

Arizona Courts were presented with the evidence set forth at E.R. A, E, G TO M, R TO Y. They refused to consider the evidence for they believe that a jury verdict of guilty/ forecloses review of actual innocence claims, by state law (E.R. 0)

HEARING IN ARIZONA COURTS

Neither the Arizona Courts nor the Executive Branch gave petitioner any hearing for it is their position a jury verdict forecloses actual innocence claims.

REASONABLE JURISTS MAY DIFFER

In Carringer v Stewart 132 F3d 463, 476' (9th Cir. 1997) this court stated a habeas petitioner "asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove he is probably innocent" In this case:

1. The Arizona Courts refused to consider this claim saying that once a jury returns a guilty verdict, actual% innocence claims cannot be considered under Arizona Law.
2. The Arizona Board of Executive Clemency refused to consider the claim because State Law forbids them from considering the claim.
3. The District Court declined to consider the evidence referred to in E.R. A, E, G to 1h., R to Y.

(See E.R. Y pp 10)

The Herrera court stated that the request for executive clemency was the proper vehicle for actual innocence claims to be reviewed 506 U.S. 411-412. In this case as evident by E.R. 0, Arizona Courts have determined that petitioner cannot have the board of executive, clemency review this claim.

Herrera also stated if there were no state avenue of post-conviction relief available, even if the conviction was *the product of a fair trial, habeas review was available for actual innocence claims 506 U.S. at 417.

Reasonable jurists would differ on the issue and petitioner may be afforded relief on this claim, hence a certificate of appealability should issue Miller-El, supra.

SIXTH GROUND FOR CERTIFICATE OF APPEALABILITY

THE DISTRICT COURT WAS IN ERROR WHEN IT GAVE THE PRESUMPTION OF CORRECTNESS TO THE ARIZONA.COURT'S FINDINGS AS PETITIONER HAS SHOWN BY CLEAR AND CONVINCING EVIDENCE THEY WERE ERRONEOUS

The United States Supreme Court stated in Miller-El supra at 123 S.Ct 1041

> "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. .A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence"

Here, the relevant findings by the Arizona Court at issue is E.R. N. Both. the Arizona Supreme Court and Court Of Appeals issued post card denials as to these, findings. By clear and convincing evidence petitioner has shown these findings are incorrect.

1. They were made by one of the judges who asked evidence be destroyed (E.R. M)
2. The Arizona Attorney General Submitted an affidavit stating one of the judges made a call about the evidence. (E.R.L)
3. The State Of Arizona submitted internal reports showing the State:had lost the

evidence at issue (E.R. I, J, K)

4. The other evidence (E.R. G, R to X, Y, E) which Arizona Courts declined to consider supports the claims.
5. Arizona Courts made credibility findings without any evidentiary hearing Anderson, supra 232 F3d at 1054
6. Arizona courts found facts with no suppo-t in the record Marshall, supra 459 U.S. at 432
7. Arizona courts refused to let petitioner develop the facts Jeffries, supra 114 F3d at 1009
8. S. .Without evidentiary hearing Arizona courts made reliability determination as to the evidence Swan supra 6 F3d at 1379
9. Nothing in the determination by the Arizona Courts has any support in this record. (E.R. N) Judge Martin made this finding and also the disclosure by the state in E.R. M that he asked for destruction of the records/evidence and disclosure in the affidavit E.R. L that the presiding judge of the criminal court, Judge Ronald Reinstein called, clearly shows that his findings were made just to shut petitioner up.

As such, for these reasons and that set forth in E.R. Y it is possible this issue may be decided differently by another judge and the certificate of appealability on this issue should issue.

The court should have held an evidentiary hearing before it decided whether or not to afford the presumption of correctness to these findings.

The presumption of correctness does not apply to "questions of law and fact" and in the instant petition, every issue involves mixed questions, hence it was error to give this presumption Swan supra 6 F3d at 1379 In this case, all issues the applicable principles can only be given meaning only through it's application to the facts of the case, and hence, the presumption of correctness does not apply Miller v Fenton 474 U.S. 104, 114 (1985) Ashford v Gilmore 167 F3d 1130, 1135 (7th Cir 1999)(The Attorney General in the affidavit E.R. L states Judge Ronald Reinstein made a call and in E.R. Mi the state states that Judges asked for destruction of records. As such, their findings have no presumption of correctness)

SEVENTH GROUND FOR CERTIFICATE OF APPEALABILITY

THE DECISION OF THE DISTRICT COURT TO DENY DISCOVERY CONFLICTS WITH BRACY v GRAMLEY 520 U.S. 899 (1997)

As set forth in H.R. A petitioner sought discovery on the issue as Respondents the materials never existed/ are bogus or · manufactured by petitioner. The Magistrate Judge denied discovery (E.R. B) and the District Court upheld that denial (E.R. C) finding no good cause.

Bracy v Gramley, 117 S.Ct 1793 (1997) states if discovery of materials would entitle petitioner to relief (E.R. A and Y) the court should allow discovery.

As reasonable jurists would differ on the issue that the discovery set forth in E.R. A would not have

aided petitioner in this matter, a certificate of appealability should be issued on this issue. (E.R. A and Y)

EIGHTH GROUND FOR CERTIFICATE OF APPEALABILITY

THE DISTRICT COURT SHOULD HAVE GRANTED AN EVIDENTIARY HEARING

Petitioner had diligently sought to develop the factual basis of these claims in the state courts, but was denied this opportunity by the state courts, and hence under Baja v Ducharme, 187 F3d 1075, 3.079 (9th Cir. 1999) the district court should have held the hearing because with the hearing petitioner would have prevailed.

This court should issue a certificate of appealability on this issue because reasonable jurists may differ on this issue and this petitioner may prevail

NINTH GROUND FORTHE CERTIFICATE OF APPEALABILITY

FEDERAL COURTS HAVE EXERCISED EQUITABLE JURISDICTION ON FEDERAL HABEAS UNDER AEDPA

In Spitsyn v Moore NO: 02-3554 (9th Cir October 3, 2003) 2003 DJDAR 11192 this court found that an attorney's failure to file a habeas, may entitle that petitioner to equitable tolling. Likewise in Brambles v Duncan NO Q1-55716 (9th Cir 9/2/03) 2003 DJDAR 10046 this court held equitable tolling applied as the

petitioner misled by the District Court. see also Smith v Ratelle 2003 DJDAR 3383 (9th Cir 3/26/03). In these cases, the fault was not attributable to the petitioner, but "someone else"

As in the instant case, Respondents conduct is at issue, this Court should grant relief.

AS THE LAW IS WELL SETTLED TEAT "IT IS NOT ENOUGH TO ANSWER THAT THE COURT WILL EVALUATE THE FACTS PLEADED IN LIGHT OF RELEVANT LAW" SHOULD PETITIONER BE ALLOWED TO FILE A SECOND HABEAS RAISING THOSE EXHAUSTED CLAIMS WHICH WERE NOT RAISED BECAUSE. OF THE METHOD OF ACCESS

Prisoners have a constitutional right to "meaningful" access to the courts Bounds v Smith, 430 U.S. 817, 828 (1977) and this right mandates prison authorities give inmates access to adegate law libraries or adequate assistance from persons trained in law Id at 828. "The tools [Bounds] requires to be provides are those that the inmate needs in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." Lewis v Casey, 518 U.S. 343, 355 (1996). To prevail the prisoner must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim" Id at 351. The Supreme Court has consistently emphasized "habeas corpus and civil rights actions are of 'fundamental importance...in our constitutional scheme because they directly protect our most valued rights." Bounds 430 U.S. at 827

The method of access used by 'Respondents to fulfill their Bounds obligations is set forth at EX Z.

Paralegals are forbidden from conducting-legal research and advising inmates what issues are appropriate for federal habeas. Petitioner did not have the necessary authority available to him to determine what issues other than those in the habeas, were appropriate for federal habeas (Declaration at 1).

In Bounds the supreme Court fully recognized the importance of a prisoner's right to the library or to a trained legal assistant in order to properly respond to the State's ;answers to a habeas petition Bounds 430 U.S. at 825-826. The Court noted

> "Moreover, if the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." 24 at 826

Without access to the library or trained legal assistant, as required by Bounds, a pro se litigant loses the ability to represent himself Faretta v California, 422 U.S. 806 (1975)(a criminal defendant has a Sixth Amendment right to represent himself)(petitioner understands this right is non existent on federal habeas). When a pro se litigant's right to represent himself is denied by denial of access to a law library or trained legal assistants, the claim is proper by way of federal habeas U.S. v Janis, 820 F.Supp. 512, 514 (S.D.Ca 1992)(the usual way for raising claims of denial of access to the courts is through civil rights

actions but court will entertain claim in a criminal case "as they relate to his right to adequately represent himself"). In the context of the right to represent oneself, the actual injury requirements of Lewis v Casey do not apply because that case involved a civil rights case about the conditions of confinement by class of inmates Lewis at 346 (Respondents are 22 inmates who filed a class action).

Because of the denial of access to a law library and the prohibition on paralegals to assist inmates in providing petitioner with the necessary points and authorities to identify which claims exhausted claims were proper for federal habeas, the petitioner was unable to present the exhausted .claims on federal habeas such as change in theory—judicial bias---sufficiency of evidence---defects in jury instructions and other claims presented to the Arizona Courts.

In Gilmore v California, 220 F3d 987, 993 (9th Cir 2000) the court stated

> "The wording of the statute and the wishes of scholars notwithstanding, this Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus—He should know which facts are legally significant, and merit presentation to the Court/ and which are irrelevant or confusing."

This petitioner could not file a federal habeas asserting all the grounds raised in the Arizona Court

system because of a lack of access to a Law library, and due to the refusal of the paralegal to assist the petitioner (See Declaration at 1)

Thus the denial of access to the courts/ caused petitioner to not present all the claims. The court observed in Procunier v Martinez, 416 U.S. 405-406 (1969) "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims...when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Gilmore v Lynch, 319 F.Supp. 105, 110 (N.D.Ca 1970) on remand from Gilmore v Lynch, 400 F2d 228 (9th Cir 1968) states that reasonable access to courts means "all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him"

"Absent the clearest command to the contrary" Califano v Yamasaki, 442 U.S. 682, 705 (1979) federal courts have the power to remedy wrongs. .As stated in Gilmore v California, 220 F3d 987 (9th Cir. 2000)

> "where a court seek to correct a constitutional violation established in the course of litigation, the court's exercise of equitable discretion must heel close to the identified violation and respect "the interests of state and local authorities in managing their own affairs, consistent with the constitution the well-settled principle that the nature and scope of the remedy are to be determined by the violation means that the federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed

> appropriate limits .if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional-violation....But where, as here, a constitutional violation has been found,, the remedy does not "exceed" the violation if the remedy is tailored to cure the "condition that offends the Constitution."(internal quotations, text, and citations omitted)

As the method of access used by the Respondents---no law library--a prohibition on their paralegals from complying with the provisions of Bounds in assisting petitioner in deciding "Which :acts are legally sufficient" Gilmore, supra caused petitioner to only present the claims present and not present the claims presented to the Arizona Courts "other than that in the habeas", this court should exercise it's equitable power and direct Respondents to (a) either provide petitioner with access to a law library so that petitioner research what '4aims are viable (b) direct their paralegals to research the claims presented in the Arizona Courts and advise petitioner "which facts are legally sufficient" and (c) allow petitioner to file a second habeas with the claims based on facts determined "legally sufficient"

But for the Bounds violation, the claims would have been presented.

S/D_____
ANANT KUMAR TRIPATI

DECLARATION

I, Anant Kumar Tripati first duly sworn upon oath state under 28 U.B.C:-1746 the following facts are true and correct and I can so testify:

1. I used whatever legal resources I had available to me to file my habeas and was unable to obtain the necessary legal materials, to review and determine, which of my claims, presented to the Arizona Courts, were viable for federal habeas.

   I cannot retain counsel to represent me on habeas.

   To fulfil their Bounds obligations Respondents use the method in EX Z. There are no cases that I can revie to decide what claims and theories are viable on federal habeas.

   I asked the paralegal for assistance and was told that assistance cannot be provided because Respondents policies forbid the paralegals from conducting legal research/ identifying viable habeas issues.

   As a direct result of the deficiencies in the method of access, I was unable to determine, if my claims on change in legal theory, sufficiency of evidence, etc were viable federal habeas claims

Had the method of access allowed me the opportunity to find what facts are cognizable under federal habeas, I would have presented those viable claims, by way of federal habeas.

Respondents have intentionally implemented the method of access in EX Z, for the explicit purpose of ensuring that inmates like me, who do not have the necessary tools, do not present their claims. I am not at fault but Respondents policies.

Executed under the penalty of perjury on 2/3/04

S/D_____
ANANT KUMAR TRIPATI

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCH 30 2005

In re: ANANT KUMAR TRIPATI,

No. 93-80317

Agency No.
35-528-394

Respondent, ORDER

Before: B. FLETCHER, TROTT and PAEZ, Circuit Judges

This court has reviewed the petition for review and accompanying documents lodged February 8, 2005 pursuant to the pre-filing review order entered in this docket. Because this court lacks jurisdiction over the petition based on petitioners' convictions, the petition shall not be permitted to proceed.

A certified copy of this order served on the agency shall constitute the mandate of this court.

No motions for reconsideration, rehearsing, classification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

FILED COPY
FEB 28 2006
US COURT APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ANANT KUMAR TRIPATI,	)	No. 93-80317
	)	D.C.No. CV-03-1122
Respondent	)	DCG
	)	District of Arizona
	)	Phoenix

ORDER

Before: SCHROEDER, Chief Judge, GOODWIN and RAWLINSON, Circuit Judges.

This court has reviewed the notice of appeal and accompanying documents filed January 3, 2006 in the above-referenced district court docket pursuant to the pre-filing review order entered in this docket. Because the appeal lacks merit, it shall not be permitted to proceed.

A certified copy of this order served on the district court shall constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

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NOV 22 2002
CLERK S DISTRICT
COURT ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

George Luis HERRERA, Petitioner, v. TERRY STEWART, et al, Respondents	**ORDER**

No. CIV 00-226 PHX RCB

Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. S 2254 (doc. # 1), alleging various grounds for relief. Respondents answered (doc. # 9) asserting that the Petition was untimely under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Magistrate Judge issued a Report and Recommendation (R&R) (doc. # 18) in which he agreed that the Petition was untimely, but also examined the merits. The R&R

recommended that the Petition be denied.

I. BACKGROUND

Petitioner was convicted of second degree murder and aggravated assault. Exhibits for Ans. to Pet. for Writ of Habeas Corpus (doc. # 9A) Ex. F at 2-3. He was sentenced to consecutive terms of twenty- years on the murder conviction, and seventeen years for the assault. Id. Ex. G at 21. The Arizona Court of Appeals affirmed the convictions and sentences on March 27, 1997, Id. Ex. J, and the Arizona Supreme Court denied review without comment on September 19, 1997, Id. Ex. L. On October 9, 1997, the Arizona Court of Appeals entered its order and mandate pursuant to its decision affirming Petitioner's conviction and sentences. Id. Ex. M.

On October 9, 1998, Petitioner filed a petition for post-conviction review in the Arizona Superior Court. Id. Ex. N. The petition itself was dated October 5, 1998. Id. The trial court summarily dismissed the petition as untimely on October 13, 1999. Id. Ex. P. Petitioner did not seek review of this decision in either the Arizona Court of Appeals or the Arizona Supreme Court. Petition for Writ of Habeas Corpus (doc. # 1) at 2. Petitioner's federal Petition for Writ of Habeas Corpus (doc. # 1) was not filed until February 7, 2000.

II. TIMELINESS

The AEDPA requires a state prisoner to file his federal habeas petition within one year of the date that his process of direct review comes to an end. 28 U.S.C. § 2244(d)(1). The statute of limitations is tolled during the pendency of a state

court action for post-conviction relief. 28 U.S.C. § 2244(d)(2). However, the limitations period runs during the break between the issuance of a final decision on direct appeal and "the time the first state collateral challenge is filed because there is no case 'pending' during that interval." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). In addition, once the collateral relief proceeding concludes, the tolling ceases and the clock picks up where it left off at the time the collateral challenge was filed. Id. at 1006- 07.

Equitable tolling may be available even after the statute of limitations period has expired if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Calderon v. United Stares Dist. Ct. for the Central Dist. of Cal., 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds Calderon v. United States Dist. Ct. for the Central Dist. of Cal.,163 F.3d 530 (9th Cir. 1998)(en banc). The Ninth Circuit has noted that determinations of "whether there are grounds for equitable tolling are highly fact dependent." Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc). However, the doctrine of equitable tolling is not available to avoid negligence. Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998).

A. Statutory Tolling

Petitioner's direct appeal came to an end on October 9, 1997, when the Arizona Court of Appeals issued its mandate affirming Petitioner's convictions and sentences. From that time the one-year limitations period for filing a federal habeas petition began to run, and Petitioner had until October 9, 1998 to file a habeas petition with this Court. However, the statute's

limitations period was tolled when he filed his state petition for post-conviction relief. Assuming the earlier date of October 5, 1998, the date on the Petition, the limitations period was tolled with only four days remaining. After the petition for state post-conviction relief was dismissed on October 13, 1999, Petitioner had thirty days to seek appellate review. Assuming that the case
Remained pending until the time for seeking review expired, the statutory tolling ceased on November 12, 1999. Petitioner then had four days in which to file a federal petition for habeas relief, or until November 16, 1999. Therefore, even assuming the most generous dates, Petitioner's Petition for Writ of Habeas Corpus (doc. # 1), filed in this Court on February 7, 2000, is untimely.

B. Equitable Tolling

Petitioner argues that equitable tolling is appropriate in this case because he claims he was given misleading information from his attorney and an unnamed paralegal, there are no law libraries in the prison, and the statute is ambiguous and difficult to understand.

Petitioner claims that his attorney was at fault for his untimely filing because the attorney told Petitioner that he had to submit his ineffective assistance of counsel claim to the state court before pursuing federal habeas relief. This fact does not warrant equitable tolling for several reasons. First, Petitioner's attorney was correct in telling him to exhaust his state remedies before pursuing his claims in federal court. Second, Petitioner received the benefit of statutory tolling while pursuing his state petition for

post-conviction relief; therefore, following his attorney's advice did not disadvantage Petitioner in any way. Third, Petitioner's three month delay in filing his federal petition after the state court dismissed his claims cannot be attributed to the correct advice he received from his attorney.

Petitioner also claims that an unnamed paralegal at the Arizona Department of Corrections told him his federal petition was within the limitations period. Petitioner does not state when he received this advice. It is unclear whether Petitioner immediately filed his Petition after he was told that he was within the limitations period or whether he delayed. In any event, Petitioner does not state that he was unaware of the statute of limitations, or that he was prevented from filing the Petition in November before the limitations period ended, only that he may have received bad advice. Petitioner's failure to do the math himself and figure out when his one-year statutory limit ended was negligent, and equitable tolling is not available for negligence.

Finally, Petitioner complains that his inability to understand the law and the lack of legal materials available to him warrant equitable tolling. He further argues that the statute was ambiguous, and without case law he could not understand the statutory tolling provisions. Petitioner's claims that these circumstances prevented him from filing a timely petition are disingenuous. Petitioner has repeatedly stated that he was prepared to file his federal habeas petition before he initiated his state post-conviction proceedings. Traverse (doc. # 12) at 2; Traverse (doc. # 13) at 3. Thus, none of these circumstances made it impossible for Petitioner to file his petition on time; he simply

chose to delay. Therefore, equitable tolling is not warranted in this case.

III. CONCLUSION

Petitioner's Petition for Writ of Habeas Corpus (doe. # 1) is untimely, even after taking into account any statutory tolling period. Further, Petitioner has not demonstrated that equitable tolling is warranted in this case. Therefore, there is no need to review the Magistrate Judge's recommendations on the merits of the Petition.

IT IS ORDERED that the Magistrate Judge's Report and Recommendation (doc. # 18) is ADOPTED IN PART. Petitioner's Petition for Writ of Habeas Corpus (doc. # 1) is DISMISSED as untimely. The clerk is directed to enter judgment and terminate this action.

DATED this 21 day of November, 2002.

S/_____

ROBERT C BROOMFIELD

SENIOR US DISTRICT COURT JUDGE

Copies to counsel of record

FILED COPY
JAN 07 2003
CLERK S DISTRICT
COURT ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

George Luis HERRERA,
Petitioner,
v.
TERRY STEWART, et al,
Respondents

No. CIV 00-226 PHX RCB

CERTIFICATE OF APPEALABILITY
And
ORDER TO PROCEED ON APPEAL
IN FORMA PAUPERIS

I, Robert C. Broomfield, Judge of the United States District Court for the District of Arizona, certify

that I have examined the Petition of George Luis Herrera for issuance of a Certificate of Appealability, together with the application for a Writ of Habeas Corpus filed in this Court, and FIND:

[ ]That probable cause exists for the appeal taken in the above-named cause through the United States Court of Appeals for the Ninth Circuit from the Order of this Court denying petitioner's application for Writ of Habeas Corpus, and GRANTS that petitioner be allowed to proceed in forma pauperis for appeal purposes only. The appellant has made a substantial showing of the denial of a constitutional right with respect to the following issues:

[x] that probable cause does not exist for the appeal. The applicant has not made a substantial showing of the denial of a constitutional right.

The clerk shall forthwith notify the parties of the entry of this Certificate of Appealability and Order to Proceed In Forma Pauperis on Appeal.

Dated this 6 day of January, 2003

S/_____
ROBERT C BROOMFIELD
United States District Judge

FILED COPY
FEB 25 1999
CLERK S OF THE
COURT ARIZONA

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Hon. SUSAN R BOLTON

CR 95-05573

STATE OF ARIZONA,	)
v.	)
GEORGE LUIS HERRERA	)

GEORGE L. HERRERA, # 121430
ASPC-FLORENCE
CENTRAL UNIT 7-I-9
PO BOX 8200
FLORENCE, AZ 85232

The Court has reviewed the Defendant's Pro Se Petition for Post-Conviction Relief and the State's response thereto. No reply was filed.

The Defendant was convicted of one count of second degree murder and one count of aggravated assault, both dangerous offenses and dangerous crimes against children. Defendant appealed his convictions and sentences and his conviction was affirmed by the Court of Appeals in 1 CA-CR 96-0374.

In his petition for post-conviction relief, the Defendant raises several claims, all but one of which is precluded or waived as a result of his appeal. See Rule 32.2 Arizona Rules of Criminal Procedure. Specifically, the following claims are precluded or waived: (1) Any alleged abuse of this court's discretion in allowing certain testimony to come into evidence at trial; (2) any alleged abuse of discretion in restricting impeachment of a trial witness; (3) any alleged abuse of discretion in the admission of certain evidence at trial; (4) any claim that the Defendant was denied a fair trial because his father was denied an interpreter and in the dismissal of the Defendant's interpreter; and, (5) any claim that there was any error in sentencing.

The only issue that the Defendant has raised and which can be considered on this petition for post-conviction relief is the Defendant's claim that trial counsel was ineffective.

In order to sustain a claim of ineffective assistance of counsel, the Defendant must satisfy both prongs of a two-prong test established in Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). The Defendant must show both that counsel's performance was deficient and that such deficient performance prejudiced the defense.

The Defendant first claims that counsel was ineffective by failing to keep a certain witness' conflicting statements from the jury. A review of the trial transcripts in this case shows that the issues concerning the conflicting statements made by this witness were the subject of argument and rulings by the Court. The Defendant has failed to show what defense counsel could have done that defense counsel did not do to attempt to block the introduction of this evidence against the Defendant.

Defendant also complains that defense counsel was ineffective because he failed to object to the jury reading an English translation of a police interview. This is untrue. The record reflects that defense counsel made numerous objections to allowing the transcript to be read while the video tape was played and also objected to the admission of the video tape.

The Defendant also contends that defense counsel was ineffective in failing to intervene when the Court deprived him of a court interpreter, leaving him unable to communicate with counsel. The record is insufficient to show that Defendant was unable to communicate with counsel or in need of a court interpreter. To the contrary, numerous portions of the record, some of which are cited by the State, demonstrate the Defendant's knowledge and understanding and ability to communicate in the

English language.

The Defendant next suggests that counsel was ineffective because when he advised his lawyer that he wanted to testify, defense counsel told him, "The State will eat you alive.% The Defendant does not claim that he was unaware of his right to testify nor deprived of his right to testify. This argument seems

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OCT 09 1997
CLERK S OF THE
COURT ARIZONA

In the
COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

CR 95-05573

STATE OF ARIZONA, Appellee,	)	1 CA-CR 96-0374
v.	)	DEPARTMENT A
GEORGE JUAN GONZALES, aka GEORGE LUIS HERRERA Appellant	)	MARICOPA County Superior Court No. CR 95-05573

ORDER and MANDATE

Grant Woods, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section and Consuelo M. Ohanesian, Assistant Attorney General
Attorneys for Appellee Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By: James R. Rummage, Deputy Public Defender
Attorneys for Appellant Phoenix

The memorandum decision of this Court in the above matter was filed on March 27, 1997.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated September 16, 1997, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-97-0246-PR.

IT IS ORDERED in conformity with the memorandum decision attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the memorandum decision of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on October 9, 1997. A copy of the ORDER and MANDATE and a copy of the memorandum decision were mailed to the Honorable Susan R. Bolton, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party

appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of the Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED October 9, 1997.

S/_____VICE CHIEF JUDGE

All of the foregoing directives were complied with October 9, 1997.

GLEN D CLARK, Clerk

RECEIVED
OCT 14 1997
Criminal Appeals
Attorney General

Legal & Law

Barristers to Petition The European Court of Human Rights to Highlight Human Rights Abuses, Judicial Corruption, and Miscarriages of Justice Within the State of Arizona

Edited by Carly Zander

Tue, 03 Oct 2006, 23:53:00 GMT

SHEFFIELD, U.K. - Oct. 3 (SEND2PRESS NEWSWIRE) -- Mr. Michael Nashvili, speaking for Mr. Anant Kumar Tripati, and a representative of a group based in Europe that is raising awareness of Tripati's case, states "I have been contacted by four legal services groups from the European Union who are considering filing a petition with the European Union to bar member countries from doing business with Arizona in order to highlight judicial corruption in Arizona."

Documents to be cited in the petition include evidence that shows:

Judges in Arizona have been rigging court cases in order to protect other judges. They are preventing any cases, or compelling evidence in Mr. Tripati's favour, from being presented in a court of law by Mr. Tripati. [Document 7-(Memo from Judge Brian Hauser to Judge Robert Myers) and Document 3-(Arizona Department of Corrections Information Report) at www.corruptarizonacourts.com/keydocs.html].

Arizona authorities manufactured crimes with no

supporting physical evidence whatsoever in order to convict Mr. Tripati, and have sent him to prison until 2044 [Document 2- (Letter by Robert Girdley to the AZ Attorney General) at wwwcorruptarizonacourts.com/key documents]. Mr. Tripati was sentenced to 52.5 years for the crime of "fraudulent schemes" based only upon false testimony obtained by witness intimidation and witness tampering.

Additional evidentiary documents are available at www.corruptarizonacourts.com that clearly demonstrates testimony was falsified by Arizona authorities, and was covered up by members of the judiciary.

Barristers believe that in light of these documents, economic sanctions are warranted because Mr. Tripati is a Commonwealth citizen.

During the course of his legal research work, Mr. Tripati amassed documentation demonstrating the systemic prosecution of people in Arizona by fabricating crimes, evidenced, and perjured testimony. The material evidenced Judicial complicity in this corruption, and Judges protecting each other from exposure of their actions. When these people learned that Mr. Tripati intended to expose this judicial corruption, crimes were allegedly manufactured against Mr. Tripati to stop him.

The documents allegedly show that there has been a miscarriage of justice resulting in a set of wrongful convictions, and raise too many questions about the actions taken against Mr. Tripati. The sentence is disproportionate and inhumane, as crimes of violence and murder get lesser sentences in Arizona. Mr. Tripati must be given a full blown evidentiary hearing in an

open court of law with an unbiased jury. For more information, please contact Mr. Michael Nashvili (mnashvili@hotmail.com) a representative of a group based in Europe that is raising awareness of Mr. Tripati's case. Send2Presse is the originating wire service for this story.

Voters in Arizona and California Work to Protect Victims of Judicial Corruption :: Wed, ... Page 1 of 1

Legal & Law

Voters in Arizona and California Work to Protect Victims of Judicial Corruption

Edited by Carly Zander

Wed, 20 Dec 2006, 18:37:00 GMT

WASHINGTON, D.C. - Dec. 20 (SEND2PRESS NEWSWIRE) -- A federal judicial reform group led by Victor Palomino is submitting an online petition to Congress to curb alleged judicial corruption. The petition is in response to recent evidence for increased negligence and alleged corruption by members of the judiciary. The goal is to hold Federal Judges accountable, in order to ensure that innocent people are not made into victims.

"We request on April 23, 2007 that all U.S. citizens send emails to Congress asking for the establishment of an independent non judicial body that has full subpoena powers to investigate Federal Judges," says Palomino.

Litigants who have evidence that a judge has engaged in misconduct or misinterpreted facts of the law should be able to lodge complaints with this agency. If there is

evidence for misconduct, the judges would be disciplined and the relevant decisions invalidated. In order to avoid separation of powers problems, the agency would have to report to the Supreme Court, and the Supreme Court would have the right to review decisions made by the body.

Anant Kumar Tripati has been actively challenging judicial corruption in the courts:

On November 3, 2006 Justice Sandra Day O'Connor and Judges Pamela Ann Rymer and Sidney R. Thomas of the Ninth Circuit decided on appeal 04-17148 brought by Mr. Tripati. Their decision is posted on www.corruptarizonacourts.com along with other key legal documents.

Fred Romero, an attorney speaking for Mr. Tripati, states that: "We have been advised by lawyers who have reviewed the record and the decision that because Anant Kumar Tripati has been active in challenging judicial corruption, the courts have blacklisted him. The decision by Justice O'Connor and the two Circuit Judges does not have any support in the record. It appears that federal judges are acting to protect former colleagues accused of corruption at the state level."

This ruling is the latest in a series on the Tripati case, where Federal Judges have been accused of a dereliction of duty in denying the right of appeal without reviewing the record. It is crucial that cases alleging judicial impropriety, such as Mr. Tripati's, have an independent body to oversee the conduct of Federal Judges hearing the case.

Please contact Victor Palomino at federaljudicialreform@gmail.com for information on the petition.

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Secretary of State
1700 W. Washington, 7th Floor
Phoenix, AZ 85007

(stamped) Received
Secretary of State
Nov 30, 2006

The undersigned intends to circulate and file an initiative petition and hereby makes application for the issuance of an official serial number to be printed in the lower right-hand corner of each side of each signature sheet of such petition. Pursuant to Arizona Revised Statutes * 19-111, attached hereto is the full text, in no less than eight point type, of the Constitutional Amendment intended to be initiated at the next general election.

Summary: A description of no more than one hundred words of the principal provisions of the proposed law, constitutional amendment or measure that will appear in no less than eight point type on the face of each petition signature sheet to be circulated.

All political power is inherent in the people, the Government's power comes from the consent of the people, and is to be protected and maintain individual rights.

Too many government employees are dishonest and engage in acts that protect each other, including falsifying records. This amendent holds the employee and employer accountable. Honest citizens of the state of Arizona are being injured by these employees and

their code of silence.

To protect themselves, these employees with the help of the legislature and the courts are emplacing rules and laws, which injure honest citizens of Arizona, their loved ones, and property.

Signature of Applicant:
Name of Organization:
S/ Marla K Haskins
Yes on Arizona Government Employee Accountability C-03-2008

Printed name of applicant:
Address: 4638 E Kachina Trail
Marla Kay Haskins
City: PHX State: AZ Zip Code 85044

Telephone: 408 785-1431
Address: 4638 E Kachina Trail
City: PHX State: AZ
Name of Officer and Title:
Zip Code 85044
Marla K Haskins - Chairman
Telephone: 480 785-1431
4638 E Kachina Trail
PHX, AZ, 85044

CF: 200802850
Date of application 11-30-2006
Lauriena Neal Turner - Treasurer
Signatures required: TBD
4638 E Kachina Trail

Deadline for filing: TBD
PHX, AZ, 85044
Serial number issued: C-03-2008
480 907-4109

AN INITIATIVE MEASURE

REDEFINING POLITICAL POWER IN THE ARIZONA CONSTITUTION, ARTICLE II, SECTION 2.

Be it enacted by the People of Arizona:

1. **Article II, Section 2, Constitution of Arizona is proposed to be amended as follows, if approved by the voters and on proclamation of the Governor.**
2. **The Secretary of State shall submit this proposition to the voters at the next general election as provided by Article XXI, Constitution of Arizona.**

2.2 Political Power to include Judicial Reform.

TEXT OF THE AMENDMENT

a) Whenever allegations of misconduct are made against judicial officers, the judicial officer(s) shall be suspended without pay. The decision judgment subject to the misconduct shall be held invalid.

b) The complaint for judicial misconduct made by way of a petition/motion shall be made in the Superior Court in which the matter where in the misconduct was alleged to have been committed was/is pending.

c) There shall be no filing fee for filing the complaint/petition and upon receipt of the complaint/petition the clerk of the Court shall serve a copy to the Chief Justice, the Judge accused and the complaint.

d) The Chief Justice shall appoint a Judge and a 12 person jury within 72 hours of filing of the complaint/petition.

e) Counsel shall be appointed for the complaint/petitioner.

f) A public trial shall be held and if it is shown by "some evidence" that the allegations may be true, the judicial officer shall be found Guilty.

g) As sanctions, all decisions made by the judicial officer against the complainant shall be deemed void,

h) The judicial officer shall not be allowed to ever hold any public office and the State Bar of Arizona shall disbar the judicial officer for life.

i) Hearsay evidence shall be admissible against the judicial officer.

j) The judicial officer shall disclose the complete litigation file and be subjected to oral depositions.

k) The judicial officer may appeal the decision to the Arizona Supreme Court. If there is "some evidence" showing misconduct, the Supreme Court shall uphold the decision.

l) A minimum of seven jurors must vote in favor of a finding under this section. m) These provisions shall be retroactive to January 1, 1980.

n) In the event a judicial officer subject to these provisions has resigned or retired, if that judicial officer refuses to participate in proceedings pursuant to this amendment, the State Bar of Arizona shall disbar the judicial officer. Any and all benefits the State of Arizona pays the judicial officer shall be stopped.

o) Judicial officers in Arizona shall be held liable in Arizona for any and all actions taken by them in their judicial capacity. They shall be liable for the tort of judicial corruption "the plaintiff need only prove by "some evidence" that the allegations are true. Punitive damages shall also be assessed against the judicial officer. Assets otherwise exempt from judgments shall not be exempt for damages under this section. Any claims for judicial corruption must be brought within 25 years after the incident.

p) Criminal convictions of the claimant or prior favorable decision obtained by the judicial officers shall not be proved by the claimant a "lack of intense" or "lack of knowledge" shall not be a defense.

q) The character, reputation of the judicial officer shall not be a defense under this section.

r) The State of Arizona shall not pay for the defense of any proceedings nor shall the State of Arizona pay for any damages awarded against the judicial officer.

s) If any provision is found invalid, the other provisions shall remain in effect.

t) If it is proven by some evidence that a judicial officer made judicial decisions in any case after January 1, 1980 in which (a) any lawyer

representing any part was affiliated with any law firm with which the Judicial officer had any affiliation at anytime, be it a private law firm or any agency/entity when the judicial officer was ever affiliated with or (b) any lawyer or Judicial officer has ever attended any social/political/educational activity/gathering function that the judicial officer making the judicial decision also attended at anytime, that judicial decision shall be void and the judicial officer liable pursuant to these provisions. "Judicial officer as used in this Paragraph means" any person with the judicial, Executive or Legislative Branch who hears the position taken by parties and makes a decision. This includes hearing officers for agencies.

Secretary of State
1700 W. Washington, 7th Floor
Phoenix, AZ 85007

(stamped) Received
Secretary of State
Nov 30, 2006

The undersigned intends to circulate and file an initiative petition and hereby makes application for the issuance of an official serial number to be printed in the lower right-hand corner of each side of each signature sheet of such petition. Pursuant to Arizona Revised Statutes * 19-111, attached hereto is the full text, in no less than eight point type, of the Constitutional Amendment intended to be initiated at the next general election.

Summary: A description of no more than one hundred words of the principal provisions of the proposed law, constitutional amendment or measure that will appear in no less than eight point type on the face of each petition signature sheet to be circulated.

The Arizona Supreme Court has not been able to eliminate corruption within the Arizona Courts. Justices of the Supreme court have gone to extremes to protect corrupt Arizona Judges. Because of the failure of the Arizona Supreme Court, people of the State of Arizona have been made victims.

This amendment will provide a remedy to victims of Arizona Judges by providing for a remedy.

Victims of Arizona Courts will not have to rely the Arizona Supreme Court to protect their rights. This amendment has been forced upon us by the Arizona Supreme Court covering up for judges.

Signature of Applicant:

Name of Organization:
S/ Marla K Haskins
Yes on Judicial Reform C-02-2008

Printed name of applicant:
Address: 4638 E Kachina Trail
Marla Kay Haskins
City: PHX State: AZ Zip Code 85044

Telephone: 408 785-1431
Address: 4638 E Kachina Trail
City: PHX State: AZ
Name of Officer and Title:
Zip Code 85044

Marla K Haskins - Chairman
Telephone: 480 785-1431
4638 E Kachina Trail

PHX, AZ, 85044
CF: 200802849
Date of application 11-30-2006
Lauriena Neal Turner - Treasurer
Signatures required: TBD
4638 E Kachina Trail
Deadline for filing: TBD
PHX, AZ, 85044

Serial number issued: C-02-2008
480 907-4109

AN INITIATIVE MEASURE

REDEFINING POLITICAL POWER IN THE ARIZONA CONSTITUTION, ARTICLE II, SECTION 2.

Be it enacted by the People of Arizona:

1. **Article H, Section 2, Constitution of Arizona is proposed to be amended as follows, if approved by the voters and on proclamation of the Governor.**
2. **The Secretary of State shall submit this proposition to the voters at the next general election as provided by Article XXI, Constitution of Arizona.**

GOVERNMENTAL EMPLOYEE ACCOUNTABILITY AND HONESTY AMENDMENT

TEXT OF THE AMENDMENT

Section 2.3 Political Power and Governmental Employee Accountability.

a) Every employee of the State of Arizona shall be held accountable and liable for the wrongs they engaged in, liability in tort, and for violations of other laws that exists against every state employee to the

same extent as any person not employed by the state.
b) No employee of the State of Arizona shall be entitled to any form of immunity for actions taken by that employee.
c) Every state employee shall report other employees who have engaged in misconducts. Failure to report such misconducts shall result in liability as if that employee engaged in the acts themselves.
d) To prevail in claims against employees of the State of Arizona, the claimant need only produce slight evidence that the allegations are true.
e) The supervisors of the employee as well as the agency that employed the individual shall also be held liable to the same extent as the employee.
f) No exhaustion of state or agency remedy or claim needs to be filed in order to maintain a claim under this section.
g) No prior judgment, criminal conviction or prior decision shall act as a bar to any claim or claims.
h) Those accused shall not be allowed to invoke any privileges, shall be orally deposed and the state shall produce all the records in the matter including allegations that may fall under Arizona rules of evidence 404, 406, and 801.
i) The allegations shall be decided not by a judge and not by way of motion, but by a majority of a jury of twelve.
j) These provisions are retroactive to January 1, 1980.
k) The State of Arizona, counties within the State of Arizona, and cities within the State of Arizona shall all be liable under this section.
1) Employees, attorneys, agents, and agencies referred to in sub-paragraph above shall all be liable under these provisions.

m) Members of the judicial branch including those elected, shall be liable.

n) State, county, and city law enforcement including correctional staff shall be liable.

o) If any provisions are found invalid, other provisions shall survive.

p) Laws that conflict with any of these provisions shall be deemed as invalid.

q) If it is proven by some evidence that any Elected Official introduced legislation after January 1, 1980 at the behest of a Political Donor, that legislation shall be void and the Elected Official guilty of violating these provisions, unless and until the legislation discloses the fact that the legislation was introduced at the behest of the Political Donor.

Anant Kumar **Tripati,** Petitioner

v.

Dora B. **Schriro,** Director Arizona Department of Corrections, et al.

No. 03-9617.

SUPREME COURT OF THE UNITED STATES
541 U.S. 1039; 124 S. Ct. 2182; 158 L. Ed. 2d 727;
2004 U.S. LEXIS 3627; 72 U.S.L.W. 3712
May 17, 2004, Decided

SUBSEQUENT HISTORY: Related proceeding at Tripati v. Thompson, 2005 U.S. Dist. LEXIS 38093 (D. Ariz., Dec. 27, 2005)

JUDGES: ("1) Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: (*2182] Motion of petitioner for leave to proceed in forma pauperis denied, and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit dismissed. See Rule 39.8. As petitioner have repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fees required by Rule 38(a) is paid and [*2183] petition submitted in

compliance with Rule 33.1. See Martin v. District of Columbia Court of Appeals, 506 U.S. 1, 121 L. Ed. 2d 305, 113 S. Ct. 397 (1992) (per curiam). Justice Stevens dissents. See id., 506 U.S. at 4, 121 L. Ed. 2d 305, 113 S. Ct. 397, and cases cited therein.

FREDERICK A. ROMERO
ATTORNEY AT LAW
POST OFFICE BOX 70662
PASADENA, CALIFORNIA 91117
(213) 880-0924
APRIL 30, 2007

NO: 93- 80317

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

IN RE ANANT KUMAR TRIPATI,

PETITIONER;

PETITION FOR A

WRIT OF MANDAMUS

INITIAL EN BANC

SUBMISSION REQUESTED DECLARATION OF COUNSEL FREDERICK A. ROMERO ATTORNEY AT LAW

POST OFFICE BOX 70662 PASADENA, CA 91117 (626) 796-2231; ATTORNEY FOR ANANT KUMAR TRIPATI PETITIONER

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RULES

Circuit Rule 10 3

INTRODUCTION AND ISSUES PRESENTED

It is the opinion of Counsel that this Petition for a Writ of Mandamus presents the following question of Exceptional Circumstances:

1. When the pre filing order does not forbid the filing of documents through Counsel, can the Clerk of Court refuse to file a Motion to Recall the Mandate submitted for EN BANC consideration?
2. Can the Ninth Circuit Panels continue to affirm decisions without reviewing the record and bar EN BANC review? Are the procedures adequate?

STATEMENT OF FACTS

The Ninth Circuit Appellate Panels are not reviewing the record and affirming decisions in appeals that petitioner is a party to.

On February 24, 2004 a Panel relying on some December 3, 2003 filing denied a Certificate of Appealability. However, the District Court denied the Certificate of Appealability on January 28, 2004. That Panel could not have reviewed the record. On March 30, 2005 a second Panel affirmed a decision. However, the record was with the United States Department of Justice in Maryland. That Panel did not review the record. A third Panel affirmed a decision on February 28, 2006. However, the record was in the District Court. Once again the Panel did not review the record.

All these Panels- to prevent their failing to review the record from being challenged and to prevent Tripati from showing that he is entitled to relief have ordered no reconsideration or

EN BANC review[1].

As the-filing order does not bar filing of pleadings by Counsel, a motion to recall the mandate, was submitted by Counsel.

The Clerk of the Court refused to file the Motion [see Exhibit I]. Counsel advised the Clerk that the pre-filing order did not Cousel, but pro per filings. The Clerk nevertheless rejected the filing.

THE RELIEF SOUGHT

Counsel asks that:

a. The Clerk be ordered to file the motion to recall the mandate;
b. The pre-filing ordered be modified Nunc Pro Tunc forbidding affirmance without review of the record;
c. The pre-filing order not bar EN BANC review or reconsideration.

REASONS WHY THE WRIT SHOULD BE ISSUED

The pre-filing order in 93-80317 does not bar Counsel from filing any document.

As such -the Clerk of Court should have filed the Motion to Recall the Mandate. The right to Appellate

Review mandates "meaningful Appellate Review" and this is why this Court requires the Excerpts Circuit Rule 10.

As demonstrated by Petitioner in his Motion to Recall the Mandate, the Panel did not review the record and is not reviewing the Appellate record in cases that involve Tripati [see footnote 1].

Tripati has clearly shown this with the attached evidence to his Motion to recall the mandate. This fact has further been shown by the March 30, 2005 Panel decision affirming a Justice Department decision when the record was in Maryland and the pending Motion in 04-17148.

In Cordoza v. Pacific States Steel Corp, 320 F.3D 989, 998 (9th Cir. 2003) this Court stated mandamus is proper to compel a court "to exercise its authority when it is it's duty to do so."

In the instant case:

(A) The pre-filing order does not apply to attorney filed documents. The Clerk of this Court as such has the duty to file the attached motion to recall;

(B) Meaningful Appellate review requires the Panel review the record. The intent of the Pre- filing order is not to deny Tripati the right to have meritorious claims reviewed. The Motion to Recall the Mandate that is attached shows the Panel did not conduct the meaningful review and barred Tripati from demonstrating to the Panel and the EN BANC Court that it erred.

In King v. Lamarque, 464 F.3d 963, 1040, (9th. Cir. 2006) the Petitioner challenged the proceedings used by California. The Ninth Circuit stated when such challenges are made, the burden shifts to the government to show that the procedures used by the court were adequate.

The Motion to recall the mandate attached along with the exhibits do clearly show that the procedures provided for by the pre-filing order are not adequate. It is clear the Panel did not review the record and barred Tripati from seeking reconsideration to show that the inadequate procedures denied him meaningful Appellate review.

CONCLUSION

The Clerk should be ordered to file the Motion, EN BANC review must be granted, and the procedures be modified to ensure a meaningful Appellate Review is afforded.

Respectfully submitted,
Dated April 30 , 2007
S/D _____
Frederick A. Romero
Attorney at Law
P.O Box 70662
Pasadena, CA 91117
(626) 880 - 0924

DECLARATION OF FREDERICK A. ROMERO

I, Frederick A. Romero, first duly sworn declare under the penalty of perjury the following statements are true and correct and I can so testify.

1. I am an attorney and member of the State Bar of California authorized to practice before this Court and the Central District of California.
2. I represent Anant Kumar Tripati.
3. The pre-filing order does not bar Counsel from filing petitions for Anant Kumar Tripati.
4. After reviewing the record, I determined that in my opinion the Circuit Court Panel did not review the record when it denied the Certificate of Appealability.
5. I moved to Recall the Mandate.
6. The Clerk has refused the filing.
7. As the procedures being used by the panels affirming decisions against my client are inadequate, they must be reviewed. It certainly, I believe, was not the intent of the Court to deny meaningful appellate review.
8. Arizona courts, due to the corruption of truth seeking process by the Arizona attorney General and the State's agents, denied Tripati hearings. In no State of the Union, including California, would this type of conduct be condoned. Clearly, such misconduct reflects adversely on the integrity of the judicial process.
9. This request is not made for the purpose of delay or for any improper purpose.

Executed in Los Angeles on April 30 , 2007

S/D _____

Frederick A. Romero
Attorney at Law
P.O Box 70662
Pasadena, CA 91117
(626) 880 - 0924
Attorney at Law
P. 0. Box 70662 Pasadena, CA 91117
(626) 880-0924

CERTIFICATE OF COMPLIANCE

This petition has 9 pages, is mono-spaced and typed on a 12 Pitch Courier

Date April 30 , 2007

S/D _____

Frederick A. Romero
California State Bar NO.92423
Post Office Box 70662
Pasadena, CA 91117
(213) 880-0924
Attorney for Petitioner,
Anant Kumar Tripati

FILED
JUN 12 2007
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ANANT KUMAR TRIPATI, No. 93-80317

Respondent,

Before: LEAVY, RYMER and T.G. NELSON, Circuit Judges.

Respondent's May 10, 2007 "petition for writ of mandamus," seeking mandamus relief in this court against this court, is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

[1] Counsel filed a motion to recall the mandate in 04-17148. In that case-in spite of briefing –the panel did not review the record. It refused to grant the first request to abate time to seek EN BANC review.

ARIZONA DEPARTMENT OF CORRECTIONS

MEMORANDUM

CONFIDENTIAL

To: Eyman Complex Warden / Ontiveros

From: Special Assignment /Garcia (and signed)

Date: October 24, 2006

Subject: Tripati 102081

High profile I/M, sen 2044, trusted by most staff \ inmate refused interview

Dept. recommended payment for property, legal materials, and evidence lost intentionally by staff. I/M filed lawsuits CV 1999-20757; CV2002-14210; CV2002-15874. Maricopa Judges Reinstein, Schwartz, Martin requested evidence be destroyed. A.G. Office Legal Services had staff create/destroy evidence, submit false affidavits.

I/M challenging use of false evidence and creating/destruction moved from LO6-A14 by ADW Romweber on request of Daryl Johnson. A14 engaged in misconduct in filed/rejected grievances. I/M known to resolve issues w/o grievances.

I/R's 5/27/99; 10/29/99; 1/20/01; 4/9/01; 3/18/06. I/M letter \ response 11/21/03; 11/17/03; 4/6/01; 4/25/01; 11/19/97 written by staff. Correctly outline events. Supported by faxes. E-mails, memos, notes, AIMS.

To avoid being named in lawsuits staff scribble I | D's; do not complete forms in any standard manner [see declaration of M. Patricia Fisher June 26, 2006] leave mail in I/M's housing area when I/M not in.

Tripati has substantial assistance from family, friends, and maintains a website.

Documentation shows coverup by groups of Judges with assistance from the A.G. Office, Legal Services, CIU. Someone with clout being protected. A.G.'s office wants no hearing/discovery

[from handwritten ADOC form]

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

June 7, 2007

Anant K. Tripati
P.O. Box 70662
Pasadena, CA 91117

RE: Anant Kumar Tripati

Dear Mr. Tripati:

Returned are forty copies in the above-entitled case postmarked on June 2, 2007 and received on June 7, 2007, which fails to comply with the Rules of this Court.

Pursuant to the 5/17/04 order by this Court, you were barred from filing non-criminal petitions that were not submitted in accordance with Rule 33.1. Your current submission, although a filing fee is enclosed, is not submitted in booklet format. If you wish to file the petition you must submit the materials in booklet format.

Enclosed is a sample petition you may use to reduce your petition in accordance with Rule 33.1. Your petitions and check in the amount of $300.00 are herewith returned.

Kindly correct the petition and appendix so that it complies in all respects with the Rules of the Court and return it to this office promptly so that it may be docketed. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Sincerely,
William K. Suter, Clerk By:
S/D_____
Erik Fossum (202) 479-3392

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

August 14, 2007

Anant K. Tripati
#102081
P.O. Box 3500
Florence, AZ 85232

RE: Tripati v.USCA9

Dear Mr. Tripati:

The above-entitled petition for writ of certiorari was postmarked August 6, 2007 and received August 14, 2007. The papers are returned for the following reason(s):

Pursuant to the 5/17/04 order by this Court, you were barred from filing non-criminal petitions that were not submitted in accordance with Rule 33.1. Your current submission, although a filing fee is enclosed, is not submitted in booklet format. If you wish to file the petition you must submit the materials in booklet format.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
William K. Suter, Clerk
By:
Erık Fossum (202) 479-3392

S/D_____

Erik Fossum

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

October 16, 2007

Anant K. Tripati
P.O. Box 70662
Pasadena, CA 91117

RE: Anant Kumar Tripati

Dear Mr. Tripati:

Returned are thirty-nine copies in the above-entitled case that were received again on October 16, 2007, which fails to comply with the Rules of the Court.

Question(s) presented must appear on the very first page of the petition. Rule 14.1(a).

The questions presented for review must be followed by the list of parties (if all do not appear on the cover), corporate disclosure statement (if applicable), table of contents, table of authorities, citations of the official and unofficial reports of opinions and orders entered in the case, statement of the basis for jurisdiction, constitutional provisions, treaties, etc., statement of the case, reasons for granting the writ, and the appendix. Rule 14.1

The pages containing the questions presented for

review through table of authorities should be numbered (i), (ii), (iii), etc. The following pages should be numbered 1, 2, 3, etc.

Kindly correct the petition and appendix so that it complies in all respects with the Rules of this Court and return it to this Office promptly so that it may be docketed. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Three copies of the corrected petition must be served on opposing counsel. Rule 29.3.

This office shall retain one copy of the petition and your check in the amount of $300.00 in expectation of timely receipt of a properly prepared petition.

When making the required corrections to a petition, no change to the substance of the petition may be made.
Sincerely,
William K, Suter , Clerk By:

Erik Fossum (202) 479-3392

S/D_____
ERIC FOSSUM